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Decision of the United States Court of Appeals
For the Second Circuit

No. 178—September Term, 1963.

(Argued October 22, 1963 Decided February 14, 1964.)

Docket No. 28473

[SAME TITLE]

Before:

LUMBARD, *Chief Judge*,
MEDINA and FRIENDLY, *Circuit Judges*.

Appeal from a judgment of the United States District Court for the Southern District of New York, Inzer B. Wyatt, *Judge*.

American Airlines, Inc. appeals from a judgment granting certain injunctive relief to the intervenors, Joseph V. Manning, as President of the American Airlines Chapter, Flight Engineers' International Association, *et al.*, restraining American Airlines, Inc. from collective bargaining concerning rules, rates of pay and working conditions of its Flight Engineers with any person, organization or group other than the Chapter. Opinion below not reported. Affirmed.

ARTHUR M. WISEHART, New York, N. Y. (George A. Spater and H. Wayne Wile, New York, N. Y., on the brief), *for defendant-appellant.*

MARTIN C. SEHAM, New York, N. Y., *for additional defendants-appellants.*

ASHER W. SCHWARTZ, New York, N. Y. (Walter N. Kaufman and O'Donnell & Schwartz, New York, N. Y., on the brief), *for intervenors-appellees.*

MEDINA, *Circuit Judge*:

Over the years the principal airlines in the United States have sought a solution to a congeries of controversies arising out of what is generally described as "the crew complement issue." Several phases of this controversy came to a head in the present case tried by Judge Wyatt. In the interest of brevity we may describe the parties as ALPA, the nation-wide collective bargaining representative of the pilots, the Chapter, the collective bargaining representative of the flight engineers employed by American, and certain pilots of American who broke away from ALPA and finally formed a new organization, Allied Pilots Association. The action was commenced on March 1, 1963 by ALPA challenging the right of American to bargain with the new Allied Pilots Association. On March 12, 1963 the flight engineers intervened seeking declaratory relief, and, on March 21, 1963 they were permitted to amend their pleading so as to pray for the injunctive relief that is the subject matter of this appeal. The pilots are described in the title of the action as "Additional Defendants." The upshot was a decision by Judge Wyatt having a triple aspect: (1) a holding in substance that ALPA was out and that American was entitled to bargain and enter into a collective bargaining

agreement with Allied Pilots Association, already affirmed by this Court in *Ruby* v. *American Airlines, Inc.*, 2 Cir., 1963, 323 F. 2d 248; (2) a holding that American must continue its check-off of dues for the benefit of the flight engineers, affirmed by the opinion of my brother Friendly, writing for a unanimous court in an opinion filed herewith; and (3) a holding in effect requiring American to bargain with the Chapter with respect to rules, rates of pay and working conditions of the flight engineers, based upon a finding of persistent and long continued refusal to bargain, which is the subject matter of the bargaining appeal discussed in this opinion.

The lengthy opinion of Judge Wyatt, based upon a thorough mastery of the facts as disclosed in a voluminous record of thousands of pages of testimony, supplemented by numerous exhibits, has not been published. We affirm in all respects the judgment appealed from requiring American to bargain with the flight engineers and granting certain incidental relief to make the injunction effective.

We shall assume familiarity with the "crew complement issue" and other matters described in Judge Friendly's opinion in the *Ruby* case.

The critical finding that lies at the heart of this appeal is:

> "From at least as early as January 31, 1963 to July 11, 1963, the Company refused to bargain collectively with the Chapter, and until at least as late as March 15, 1963 the Company instead bargained collectively in respect of flight engineers only with a committee, of which O'Connell was Chairman, and which the Company claimed represented the flight engineers."

The principal difference between our views and those expressed in the dissent stems from the nature of this find-

ing. We say this is a finding of pure, unadulterated fact, and that it cannot be disregarded or set aside unless clearly erroneous. We also hold that the questions of law, to be discussed in due course, stand out like sore thumbs, as indicated in Judge Wyatt's excellent opinion. That American refused to bargain is matter of fact. That it was under a legal duty to bargain is matter of law.[1]

As the matters of fact and the matters of law are thus clearly separated, we do not understand how the finding just quoted can be considered to be such an intermingling of fact and law as to give this Court any so-called power of "full review." See *Romero* v. *Garcia & Diaz, Inc.*, 2 Cir. 1961, 286 F. 2d 347; *Castro* v. *Moore-McCormack Lines, Inc.*, 2 Cir., 1963, 325 F. 2d 72.

If the power of "full review," otherwise expressed as the power to "review freely," exists in such a case as this; despite the clear separation of fact and law, the inevitable result will be lengthy opinions in which dribs and drabs of testimonial evidence, and quotations of excerpts from exhibits, will be scrambled together with bits of law into an indiscriminate mass, all for the purpose of supporting a conclusion deemed to be economically or socially wise or to be otherwise desirable. And in this hodgepodge reference will be "freely" made to testimony that the trial judge has necessarily rejected as not credible and to statements in documents that he has necessarily found to be unreliable. If true findings are only separate statements of "eviden-

1. It is quite true, as held in some of the cases cited in the dissent, that we often deal with "findings" that are no more than legal conclusions, in which event the "finding" is "freely reviewable" on appeal, because it is impossible to separate the "law" from the "fact" in the finding. The principle involved is a simple one, although not always easy to apply. It is our function to review the law. It is not our function to review the facts, except when a finding of fact by the trial judge is clearly erroneous. True findings of fact on conflicting evidence are not to be disturbed by us even if we as individual judges would have made different findings had we presided over the trial.

tiary" particulars, rather than the traditional conclusory statements of fact based upon a distillation of the proofs and the making of essential inferences of fact, the result will be a most undesirable confusion. So, at the outset we state the rule to be, especially in this case where the testimonial evidence is conflicting and the trial judge saw and heard the witnesses as they gave their testimony, and a finding of fact by a District Judge in a non-jury case must stand if there is substantial evidence to support it; and it must be assumed that conflicting testimony was rejected and that documents or parts thereof depending on the veracity of the witnesses giving such conflicting testimony were found to be unreliable, even if the trial judge does not make an endless series of detailed statements to the effect that he does not credit the testimony or part of the testimony of each witness.

Accordingly, we shall now address ourselves to a chronological statement of the course of events supplemented by comments and discussion, all for the purpose of demonstrating that the finding quoted above is supported by substantial evidence. In the process we think it will clearly appear that the proofs overwhelmingly support the finding. Some of the law questions will be adverted to briefly as we go along, and the decisive legal principles upon which the injunction is based will be summarized at the end.

I

There Was Substantial Evidence to Support the Finding of a Persistent Refusal to Bargain Over a Period of Many Months

From May 25, 1955 the Flight Engineers' International Association (FEIA) had been certified by the National Mediation Board as the bargaining agent for the American flight engineers. While the existing contract effective

May 1, 1958 did not expire according to its terms until April 30, 1963, one of its provisions permitted Section 6 "openers" to be served as affecting wages "to be effective not earlier than May 1, 1961." Accordingly, as the flight engineers insisted upon wage increases at the earliest possible date, the Chapter (i.e., the flight engineers) and American each served Section 6 "openers" in February, 1961, as affecting wage demands, as provided in the contract. There were negotiations on the subject of these wage increases from time to time between the flight engineers' team and the American negotiators, but progress was at a snail's pace. On March 14, 1962 the Chapter asked the National Mediation Board for mediation. The Board urged arbitration, the Chapter refused, and on June 21, 1962 the Board terminated its services, leaving the parties after the lapse of 30 days thereafter free from the restrictions of the Railway Labor Act.

Labor Department officials brought the flight engineers and American negotiators together in Washington, D. C., for meetings during the week of July 9, 1962. As found by Judge Wyatt, "The engineers were primarily interested in discussing wages at once," but American representatives "explained privately to the Labor Department officials that the problem on American was not so much with the engineers as with the pilots, this because the American pilots were far more interested in reduction of hours and other benefits (which would be very expensive for the Company) than in crew complement." Indeed, in May, 1962 the American pilots had informed American "that they were not interested in having the Company spend its money to qualify flight engineers • • • they wanted a reduction of hours and other benefits instead."

This in turn led to a series of developments that carry us right up to the threshold of the critical dates mentioned in Judge Wyatt's principal finding quoted above.

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We are now in Washington, D. C., in July, 1962. Labor Department officials, Chairman Leverett Edwards of the National Mediation Board, the pilots and American negotiators worked steadily from July 16 until July 25, 1962. The flight engineers "played little part" in these meetings. The net result was a collision of policies between the American pilots, who wanted reduced hours, better retirement plan provisions and miscellaneous benefits and who were not interested in the crew complement issue, and Ruby who, as President of the national organization, desired a uniform policy to be applied equally to all the major airlines.

The scene now shifts from Washington, D. C., to Fort Worth, Texas, and the dates are July 31 to August 2, 1962. The American officials are there, also the American pilots and Chairman Edwards. The flight engineers were not there and the reason for this is that the pilots and the Company officials were seeking some way of solving the crew complement issue in a way satisfactory to ALPA. The upshot was a proposal by O'Connell, chairman of the Negotiating Committee for American pilots. This was called "O'Connell's iffy," and Judge Wyatt describes it as follows: "if the Company would grant them (the pilots) reduced hours and an improved retirement plan, they on their side would agree to a three man crew without insisting that the flight engineer have a 'C and I' (thus saving the Company expensive training), and would bring the engineers not only into such an agreement but also into a merger with ALPA." There would thus be only one union in the cockpit and the Company, and the pilots would be happy and the integrity of ALPA maintained unimpaired. We shall see what was the reaction of the flight engineers.

In principle, the O'Connell proposal looked good to the engineers, provided they were to do the negotiating with respect to the increases in wages to be given to them.

Everything went smoothly through September and October, 1962. On the basis that everything was tentative and conditional until the final agreement was made and assented to by all the parties, the Chapter agreed to the merger with ALPA, and agreed to give up its separate representation of the flight engineers *for the future*, so that after the merger wages for flight engineers would be negotiated by ALPA. But the flight engineers were wary. As soon as the negotiations got around to the subject of wages, the flight engineers pointed out that there were 1600 pilots and only 600 flight engineers, and they wanted something in the agreement prescribing "the minimum relationship between the two pay scales, so that there could be some standard for future negotiations." As this could not be agreed on, even tentatively, the matter was left with the understanding "that the Chapter negotiating committee would separately negotiate with American on engineer wages for the contract then to be made, and that the engineer wage thus negotiated would form the basis for the pay relationship with pilots to be inserted in the merger agreement."

The pilots and the flight engineers then met jointly with Company officials, beginning November 1, 1962. Both the pilots and the engineers submitted separate proposals to the Company. Everything looked rosy on December 1, 1962 when O'Connell for the pilots, Manning for the flight engineers and Whitacre for the Company initialed the tentative and conditional agreement.

Judge Wyatt found:

> "Nothing which was said or done in these joint negotiations justified the company in believing that the engineers had given up their representation rights to a 'joint committee' or otherwise. It was clear that the giving up would only occur *after* a complete and over-

all agreement had been reached by all parties, which unfortunately never came to pass." (Emphasis that of Judge Wyatt.)

Before long it was apparent that Ruby would not go along for ALPA. By January 11, 1963 the American pilots and ALPA had parted company. The natural result of this was that the Company resumed negotiations with O'Connell's pilots' committee on January 16, 1963 and the flight engineers' negotiating committee joined the negotiation group on January 17, 1963.

As we now approach "at least as early as January 31, 1963," the time when Judge Wyatt found American commenced its refusal to bargain with the Chapter, it is well to bear in mind that the Chapter had throughout all these interesting developments steadfastly maintained its right separately to represent and to bargain for the flight engineers. More than this, it was especially on the alert, at all stages of the various negotiations, to preserve this right intact. The unresolved issue of additional wages for the flight engineers had at all times been in the forefront of the minds of the Chapter negotiators and they frequently expressed themselves clearly on the subject in their meetings and conferences with Company officials and also in their meetings and conferences with the pilots.

On January 24, 1963 O'Connell handed the flight engineers some substitute pages to be inserted in the tentative and conditional agreement of December 1, 1962. Blanks were placed instead of ALPA in these pages. This led to a dispute and the substitute pages were later withdrawn.

The upshot was an exchange of letters that precipitated the controversy on this bargaining appeal. Whitacre wrote to Ruby on January 28, 1963, and sent a copy to Schwartz, counsel for the Chapter. After a reference to the joint

negotiations, the letter contained the statement, "Accordingly, the Company recognized a Joint Committee for the purpose of negotiating a single agreement covering all cockpit members." Schwartz became suspicious, and he replied on January 29, 1963, with the statement:

> "Until the American Chapter, FEIA, merges with the ALPA, or any other representative of the Pilots, we remain a representative of a separate bargaining unit under the Railway Labor Act. There has never been a misunderstanding in this connection, and we do not want your letter of January 28, 1963 to create one."

Whitacre made no response to this letter from Schwartz, and it was soon all too evident that Schwartz' fears were well founded. On January 31, 1963 negotiations reached the subject of pay and retirement provisions for the flight engineers. The parties had been bargaining on this subject off and on, and it is our view that throughout this period and before the second series of "reopeners" served reciprocally on February 28, 1963, and hereafter referred to, American was under a continuing duty to bargain with the flight engineers on the subject of wages. We do not understand there to be any distinction between "wages" and "retroactive wages" or "future wages."[2]

2. American had a duty to bargain and confer with the authorized representative of the flight engineers not only in regard to the subjects raised in the "openers" that had previously been exchanged, but also in regard to "all disputes" in which the flight engineers were "interested"—including, of course, the disputes relating to crew complement and possible merger of the flight engineer and pilot unions. 45 U. S. C., Section 152 Second. In exerting pressure on the flight engineers to negotiate through a Joint Committee headed by pilot O'Connell—as the dissent concedes was done—the Company was not only refusing to bargain but was violating Section 2 Third of the Railway Labor Act, 45 U. S. C., Section 152 Third, which provides

In any event, we have now arrived at the point where the testimony is in conflict and Judge Wyatt was called upon to decide questions of veracity and credibility, not on the basis of depositions, but with the witnesses in full view testifying before him in open court. And it may be well to mention the fact, in passing, that company memoranda are not sacrosanct, especially when they contain, as they do here, a variety of contradictions.

O'Connell testified that during the January 31, 1963 meeting, "Mr. Whitacre indicated the desire to deal with the joint committee when he was referred to the wages of the flight engineers," and that "Mr. Manning, I believe, expressed the desire of the flight engineers to speak for themselves in regard to their own wages." Coming immediately after Whitacre's failure to respond to the letter from Schwartz of January 29, 1963, I do not see how Judge Wyatt could do otherwise than infer that the reason for the failure to respond to the letter was that American ignored it because it would not negotiate flight engineer wages directly with the flight engineers, which is what this case is about. His finding is:

> "The Company took the position that on and after November 1 the pilots and engineers were *already* one and that the engineers for collective bargaining purposes were being represented by a 'Joint Negotiating

that "neither party shall *in any way* interfere with, *influence*, or coerce the other in its choice of representatives." (Emphasis supplied.) The stress put by the dissent upon Section 2 Ninth of the Railway Labor Act, 45 U. S. C., Section 152 Ninth, seems to be misplaced as the controversy with which we are here concerned was not, in the language of that paragraph, a dispute "among a carrier's employees as to who are the representatives of such employees." The Chapter was the certified bargaining representative of the flight engineers. O'Connell did not purport to represent the flight engineers. Manning did not purport to represent the pilots.

Committee', of which O'Connell was chairman or spokesman. Accordingly, the Company position on January 31 was that pay and retirement provisions for engineers were matters for negotiation with the 'Joint Negotiating Committee' and not with the engineers' committee separately; the Company declined to negotiate with the engineers' committee separately." (Emphasis that of Judge Wyatt.)

Manning testified that, not only in Whitacre's letter of January 28, 1963, but on many other occasions after that date, the Company "was very firm in their position that they were dealing with a Joint Committee and that the Chairman of the Joint Committee was Mr. O'Connell, of the pilots' committee, *and that they would only talk about our wages through Mr. O'Connell or through the Joint Committee.*" (Emphasis supplied.) The Company conducted itself in this fashion despite the fact that, according to Manning, throughout these talks "we told them we had never made any arrangement with Mr. O'Connell to speak for us. We told them we were speaking for the flight engineers and representing flight engineers on American Airlines and speaking for them in so far as flight engineer affairs were concerned." Manning also testified that the flight engineers never agreed to a Joint Committee and on the one occasion, on February 2, 1963, when they offered a proposal for flight engineer wages in the name of the Joint Committee, it was only because Mr. Schoonover, of the NMB, prevailed upon them to "follow the format of making a proposal in the name of the Joint Committee" because the flight engineers "were not getting anywhere with the Company in offering proposals as flight engineers."

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E. C. Petree, a member of the Chapter Negotiating Committee, testified that on February 12, 1963 before the pilot committee and flight engineer committee met with the Company, the flight engineers asked pilot representative O'Connell "if he would mind carrying on the conversation for us since it was apparent that he could talk with Mr. Whitacre and we could not." Petree then described details of the meeting which illustrated how it was impossible for him to talk directly with Whitacre and how his communications with Whitacre concerning flight engineer wages had to be passed on via pilot O'Connell—even though Petree and Whitacre were sitting at the very same table.

Manning testified to similar experiences with Whitacre on February 13 and 14, 1963, and also to the fact that although the flight engineers reasserted their rights as a separate bargaining representative, the Company "said we had given them up to this Joint Committee and the Joint Committee was now doing the negotiating for the flight engineers." "Later on," according to Manning, "the Company represented to us that the only way they would talk to us about the [1961] wage reopener was through this Joint Committee."

Whitacre himself testified that on February 26, 1963, he told the flight engineers in words or substance that the flight engineers had agreed to the Company's proposal through the Joint Committee with Mr. O'Connell as their spokesman and that flight engineer "retroactive pay will have to be settled through the Joint Committee * * *." The Company maintained this posture despite the fact that the flight engineers never relinquished their representational rights to any Joint Committee.

It is against the background reflected in this testimony and the other facts stated in this chronological summary

that American and the Chapter served new "reopeners" on February 28, 1963.

On March 6, 8 and 12, 1963, meetings between the Company and the flight engineers were held at the suggestion of Edwards. The Company, dubbing these meetings as "bull sessions," was careful to make clear that the talks were not bargaining sessions.

Petree testified that on March 8, 1963 "we attempted to talk wages, but Mr. Wisehart objected on our wage talks, and he claimed that this is not the Joint Committee, that he could not allow negotiations on that subject to proceed."

Manning also testified that "the Company took the position all the time that they would negotiate with us through the Joint Committee, and that was the only way they would negotiate with us * * *." There is cumulative testimony to the effect that on March 6, 1963 Whitacre told Edwards that he "wouldn't yield on this joint committee concept and that he was not interested in proceeding with the flight engineers as an independent bargaining agent."

In the midst of this extraordinary episode of the "bull sessions," and on March 7, 1963 the Chapter notified American that it would not bargain through any Joint Committee, that it had not abandoned or released its rights as sole bargaining agent for the flight engineers and that it was prepared to meet with the Company "immediately."

This was no precipitate action prompted by the commencement of this action on March 1, 1963 by Ruby and ALPA. It was the inevitable consequence of the attitude taken by American from the very date of Whitacre's letter of January 28, 1963. This attitude had crystallized into an adamant position at the first "bull session" on March 6, 1963. Moreover, once ALPA's action was commenced the flight engineers had no option other than to seek to intervene in order to continue to assert and to protect their rights.

To cap the climax, in the final arguments on August 6, 1963 there was the following colloquy between Judge Wyatt and Mr. Wisehart, counsel for American:

> The Court: Bull sessions, but you weren't bargaining with them, you wouldn't bargain with them.
>
> Mr. Wisehart: That's right, but they were discussing something which obviously had been a very recent development, namely, the decision of the engineers to apparently abandon their prior course of dealing.
>
> Now, I think in terms of the engineers' equities in this matter it is important to keep that time sequence in mind.
>
> The Court: I have it very much in mind.

In the meantime, as American must have realized that on this record Judge Wyatt had no alternative other than to find it had refused to bargain separately with the flight engineers on the subject of increases in the wages of the flight engineers and retroactive pay, American dispatched its belated and most significant letter of July 11, 1963, stating that American "is *now* prepared to resume bargaining with AAL Chapter FEIA." (Emphasis supplied.)

II

Comment and Discussion

Aside from the basic law governing the case, to be discussed hereafter, the record and the briefs disclose a number of miscellaneous law points relied upon by American that can be readily disposed of, as there is no merit in any of them.

American's principal contention before Judge Wyatt and in its briefs and argument in this Court was that by entering into the joint discussions in November, 1962 FEIA

abandoned and relinquished its rights as a separate bargaining agent for the flight engineers, and that it was accordingly estopped to claim otherwise thereafter. This is referred to in the dissent as an insupportable claim, and we agree. The Chapter had a legal right to be the sole bargaining agent for the flight engineers. This right they never surrendered. Indeed, they fought consistently and tenaciously to maintain this right.

There was no change in the legal status of the parties after the exchange of the second series of "reopeners" in February, 1963 or after the commencement of the action in March, 1963. Indeed, after March 1, 1963 American acted even more contemptuously toward the Chapter and its asserted right to be treated as the sole bargaining representative of the flight engineers.

Late in March, Stepard, the FEIA Secretary-Treasurer, phoned Lamond of American and left word that "the American Committee of Flight Engineers was ready to talk wages." Lamond paid no attention to this. Lamond's testimony that toward the end of the week of March 18 he authorized Chairman Edwards to tell Schwartz that he would meet with the 'engineers' committee as soon as his schedule of court engagements would permit is wholly discredited by the record as a whole and the inherent improbability that he made any such statement. Judge Wyatt was quite justified in disregarding it. The notion that Lamond, with American's staff of lawyers at his beck and call, was too busy taking or giving depositions and supervising "operations" to respond to Stepard's message was too far-fetched to be credited by Judge Wyatt. But there is more to come.

Instead of "talking wages" with the flight engineers, the Company felt so confident of the ultimate result that it even bargained separately *with the pilots* over the wages

to be paid to the flight engineers in the new set-up. This is evidenced by the March 15, 1963 "basic working agreement" (Intervenors' Exhibit 46), which, as Judge Wyatt said, "covered both pilots and engineers, as to compensation and everything else." Then the new Allied Pilots Association was formed and ALPA was finally and irrevocably out, unless the Supreme Court should reverse our holding in *Ruby* v. *American Airlines, Inc., supra,* 2 Cir., 1963, 323 F. 2d 248.

The sequel, as described by Judge Wyatt in his opinion, was:

> "Under date of March 28, Whitacre wrote to O'Connell confirming certain understandings as to the rates of pay and retirement benefits for engineers and adding that as to retroactive pay for engineers the Company 'stands ready to meet with the Joint Committee'; apparently neither this letter nor the March 15 agreements were given to any of the engineer representatives."

An agreement between the Company and the new Allied Pilots Association was duly executed. This new collective bargaining agreement made no reference to the understandings already had between the pilots and the Company "as to the rates of pay and retirement benefits for engineers," or "retroactive pay for engineers." Instead, the Company unctuously informs the flight engineers that their rights will in no way be jeopardized. And the crowning glory is the Company's final statement in its letter to Manning of July 11, 1963, after the Company had attained its principal objectives and though the flight engineers were at its mercy—the Company "is now prepared to resume bargaining" with the Chapter. In the meantime, after the ouster of ALPA, American twice urged Judge Wyatt to dismiss the claims of the flight engineers as moot.

The bargaining rights of the Chapter have been persistently infringed, and the Company even went so far as to maintain throughout that the Chapter had no such rights. American should not be permitted to get off unscathed, under these circumstances, by a pious offer to bargain after ALPA was out, after the basic working agreement had been negotiated and after the Company's maneuvers had been so fully exposed as to make it probable that the case was irretrievably lost.

III

The Law

The basic law controlling this case is simplicity itself. The Railway Labor Act, 45 U. S. C., Sections 151 *et seq.*, as amended, requires an employer to bargain collectively with the duly certified representative of its employees on the subjects of "rates of pay, rules, and working conditions." See 45 U. S. C., Section 152 First, Second, Fourth, and Ninth; *Virginian Ry. Co.* v. *System Federation No. 40*, 1937, 300 U. S. 515, 542-549; *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R.*, 1944, 321 U. S. 50, 61; *International Association of Machinists* v. *Central Airlines, Inc.*, 1963, 372 U. S. 682, 690.

This naturally means bargaining with the collective bargaining representative and not bargaining with anyone else who does not represent those on whose behalf the certification has been made. Thus the Supreme Court in the *Virginian Railway* case, *supra*, 300 U. S. at page 548 held:

> "Both *the statute* and the decree are *aimed at* securing settlement of labor disputes by *inducing collective bargaining with the true representative of the employees and* by *preventing such bargaining with any who do*

not represent them. The obligation imposed on the employer by §2, Ninth, to treat with the true representative of the employees as designated by the Mediation Board, when read in the light of the declared purposes of the Act, and of the provisions of §2, Third and Fourth, giving to the employees the *right to* organize and *bargain collectively through the representative of their own selection, is exclusive. It imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other.*" (Emphasis supplied.)

Nor can these principles be affected by the pendency of a lawsuit. The cry "they sued us" has a hollow ring. It was ALPA which commenced the lawsuit and intervention by the Chapter was a necessary step to protect the rights of the flight engineers. It would be strange indeed if an effort to protect one's rights should be construed as giving immunity to the aggressor. Besides, as the central, basic finding of Judge Wyatt demonstrates, there had been an adamant and persistent refusal to bargain in January, February, March, April, May and June of 1963. It is futile to try to cut this up into segments and treat it piecemeal. American was under a duty to bargain with the Chapter on the subject of the wages of the flight engineers prior to the service of the second series of "reopeners," and American did bargain on this subject, on and on, up to "at least as early as January 31, 1963," when American changed its position. American was also under a duty to bargain after the service of the second series of "reopeners," after the commencement of the lawsuit and thereafter during the entire period. It was a continuing course of conduct and must be treated as such. Indeed, this would be true even if the bargaining by American prior to

the service of the second series of "reopeners" had been voluntary and not under the compulsion of the law.

How the issuance of the type of injunction authorized by the *Virginian Railway* case, *supra*, 300 U. S. 515, could be held to be an abuse of discretion is beyond our understanding. There is nothing "debatable" or doubtful about the case made out by the Chapter.

If, after such a prolonged and persistent refusal to bargain, a great airline can thumb its nose to a comparatively small labor organization, and hide its flouting of the law behind a final surrender to the effect that "now" it is ready to bargain, at so late a date as July 11, 1963, the Railway Labor Act becomes a mockery and a dead letter. This is a power play from first to last.

It is clear, at least, that the Norris-La Guardia Act, 29 U. S. C., Sections 101 *et seq.*, as amended, does not bar absolutely the use of the injunctive power of the federal courts in labor disputes. See, e.g., *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R. Co.*, 1957, 353 U. S. 30; *Brotherhood of Railroad Trainmen* v. *Howard*, 1952, 343 U. S. 768; *Virginian Ry. Co.* v. *System Federation No. 40, supra*, 1937, 300 U. S. 515.

In order to determine whether the Norris-La Guardia Act prohibits a federal court from issuing an injunction in this particular case, we must be guided by the principle laid down in *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R. Co., supra*, 1957, 353 U. S. 30. In that case, while deciding that a federal court may enjoin a labor organization from resorting to a strike over matters pending before the Adjustment Board, the Supreme Court, at page 40, said:

> "We hold that the Norris-La Guardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that

statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved. We think that the purposes of these Acts are reconcilable."

See Note (1958) 72 Harv. L. Rev. 354, 354-357, 360-364, 371.

The purpose of the Norris-La Guardia Act is to restrain the federal courts from using their injunctive power especially against labor in the form of strike breaking, to influence the outcome of labor disputes and, in accord with the aims of both the Railway Labor Act and the National Labor Relations Act, the Act expresses the intent of the Congress that labor disputes be resolved through collective bargaining. See 29 U. S. C., Section 102 (declaration of underlying policy of the Act); *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R. Co., supra,* 1944, 321 U. S. 50, 58-59; *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R. Co., supra,* 1957, 353 U. S. 30, 40-41; 75 Cong. Rec. 4505-4510, 4618-4626, 5462-5515 (1932); S. Rep. No. 163, 72d Cong., 1st Sess. 7-12 (1932); H. R. Rep. No. 669, 72d Cong., 1st Sess. 3 (1932).

Thus an injunction commanding an employer to bargain with the duly certified bargaining representative of its employees can hardly violate either the Norris-La Guardia Act or basic federal policy in the area of labor management relations. Where, as in this case, the refusal to bargain is long continued and persistent and is clearly established by the proofs, the courts should grant relief by way of injunction. *Virginian Ry. Co.* v. *System Federation No. 40, supra,* 1937, 300 U. S. 515; see *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R., supra,* 1944, 321 U. S. 50, 61-62. In the context of this case, where the NMB, in the Spring of 1962, recognized that mediation of the wage dispute was unsuccessful and the District Court, supported by the preponderance of the evidence, found as a matter of

fact that the Company refused to bargain from at least as early as January 31, 1963 until July 11, 1963, the injunction of Judge Wyatt, limited in its objective, was clearly called for.

Judge Wyatt was also justified in enjoining the pilot representatives from (1) bargaining with the Company concerning the rules, rates of pay and working conditions of the flight engineers, (2) making, publishing or implementing any agreement covering the rules, rates of pay or working conditions of the flight engineers or (3) interfering with, influencing or coercing the flight engineers with respect to their right freely to choose their bargaining representatives. The record and findings below support the reasonableness and necessity of these orders for the complete and effective relief to which the flight engineers are entitled. Cf. *Local 167* v. *United States*, 1934, 291 U. S. 293, 299; *Porter* v. *Warner Holding Co.*, 1946, 328 U. S. 395, 398.

Affirmed.

FRIENDLY, *Circuit Judge* (dissenting):

If affirmance here merely perpetuated a useless but harmless injunction directing American Airlines to do what it already was doing voluntarily, a mere notation of dissent would suffice. I am impelled to do more because the course adopted by my brothers misconceives and avoids the responsibility of appellate review by wrongly baptizing as a finding of fact—largely immune from our scrutiny—conclusions of the trial judge which it is our duty to reexamine; and further because it makes the federal courts a second ring for airline and railroad bargaining disputes in contravention of the statutory plan, and flouts the command of the Norris-La Guardia Act.

(1) For convenience I quote again what the majority characterizes as "The critical finding that lies at the heart of this appeal":

> "From at least as early as January 31, 1963 to July 11, 1963, the Company refused to bargain collectively with the Chapter, and until at least as late as March 15, 1963 the Company instead bargained collectively in respect of flight engineers only with a committee, of which O'Connell was Chairman, and which the Company claimed represented the flight engineers."

My brother Medina certifies this to be "a finding of pure, unadulterated fact." To me the only part that would clearly qualify for this certificate is the recitation that during the period from January 31 to March 15 the Company bargained only with the committee of which O'Connell was chairman—a finding which is factually correct but legally inconclusive. Although one could debate whether the final clause, using the word "represented," is a finding of "pure" fact or a legal characterization or both, there is no need to do so; if "represented" means only that the engineers were to make themselves heard in meetings held jointly with the pilots, it is right but inconclusive, whereas if it means that the committee, acting as such, could bind the engineers, it is clearly erroneous. The much emphasized initial statement of a refusal to bargain collectively, a term having legal content and consequences, is no more a finding of "pure" fact than are findings of invention, *Great A. & P. Tea Co.* v. *Supermarket Equipment Corp.*, 340 U. S. 147, 153-54 (1950), of negligence or unseaworthiness, *Romero* v. *Garcia & Diaz, Inc.*, 286 F. 2d 347, 355 (2 Cir.), cert. denied, 365 U. S. 869 (1961), and cases there cited, particularly the discussion by Judge L. Hand in *Barbarino* v. *Stanhope S.S. Co.*, 151 F. 2d 553, 555 (1945); *Van Carpals*

v. *S.S. American Harvester*, 297 F. 2d 9 (2 Cir. 1961), cert. denied, 369 U. S. 865 (1962), or of reasonable diligence, *Dale* v. *Rosenfeld*, 229 F. 2d 855, 858 (1956). See also *Baumgartner* v. *United States*, 322 U. S. 665, 670-71 (1944); *Dalehite* v. *United States*, 346 U. S. 15, 24 fn. 8 (1953); *United States* v. *Parke, Davis & Co.*, 362 U. S. 29, 44 (1960); and *Lehmann* v. *Acheson*, 206 F. 2d 592, 594 (3 Cir. 1953).

A judge's conclusion that a party refused to bargain in violation of its duty is the result of two previous steps. One is his finding of the facts as to what happened; another is his formulation of a legal standard or, more exactly, his identification of the types of facts which must be found to permit the conclusion of a violation of duty. Thus one party may well have "refused to bargain" in the precise manner or at the precise time and place upon which the other insists. Whether or not such conduct would constitute an illegal refusal depends on the formulation of a standard defining the obligation to bargain and not merely on a factual finding that on a certain day he said, "I refuse to do thus and so." The Supreme Court has recognized this distinction in the review of orders under §§8(a)(5) and (b)(3) of the National Labor Relations Act; although the Labor Board's findings of evidentiary facts and the factual inferences drawn therefrom are "findings . . . with respect to questions of fact" which §§10(e) and (f) make conclusive "if supported by substantial evidence on the record considered as a whole," the ultimate conclusion that, on such facts and the inferences therefrom, an employer or a union has refused to bargain in violation of its legal duty has been deemed open to full review. *N. L. R. B.* v. *American Nat'l Ins. Co.*, 343 U. S. 395, 409-10 (1952); *N. L. R. B.* v. *Insurance Agents' Int'l Union*, 361 U. S. 477, 499-500 (1960). Yet the scope of review over action by a district judge under the "not clearly erroneous" rule is wider than

as to administrative orders. See *District of Columbia* v. *Pace*, 320 U. S. 698 (1944), and the discussion in Stern, Review of Findings of Administrators, Judges and Juries: a Comparative Analysis, 58 Harv. L. Rev. 70, 79-89 (1944).

Calling a judge's legal conclusion a finding of fact is an all too easy way for appellate judges to obscure or even avoid legal issues when the result of the trial suits them. The important legal issue here, which my brothers neglect, is whether the Railway Labor Act prohibits an employer who faces the demands of two employee groups that call for a joint solution from insisting that the negotiations be held simultaneously in one room and across one table, and requires him instead to negotiate across two tables in two separate rooms, running back and forth from one to the other. When we strip off the plethora of words generated in weeks of negotiation and months of litigation, that is what this case is all about.

I find nothing in the Railway Labor Act that requires a result so contrary to good sense.[1] Neither, apparently, did the National Mediation Board, whose representatives attended all the joint committee sessions without demur. And neither did the Chapter which had gone along with the joint committee procedure until the bringing of the *Ruby* action led to its record-making letter of March 7 and its joining the judicial fray.

1. My brothers cite the provision in §2 Third that "neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives." American did not do this. It agreed that the Chapter represented the engineers and should designate the spokesmen for them. What it did insist on was that the spokesmen should speak at meetings held jointly with the pilots, whose assent to the contemplated arrangement was essential. We have recently upheld an employer's lock-out of one craft of employees as a defensive measure against violation of a non-strike clause by another. *New York Mailers' Union* v. *NLRB*, —— F. 2d —— (2 Cir. 1964). Employer insistence upon joint bargaining with the two crafts for solution of a common problem would seem far more innocent.

It is just as plain that American could not lawfully consider the committee *as such* the bargaining agent, either for the pilots or for the engineers. It never sought to do so.[2] But if ever there was a problem warranting an employer in demanding joint bargaining with two employee groups, this was it. Everyone had recognized from the outset that what American could and would offer its flight engineers depended on whether it could persuade its pilots to withdraw their demand for three cockpit positions for themselves and to accept an engineer for the third. The Chapter had a vital interest in a negotiating framework that would afford the best chance to accomplish this. The first fruit of the joint negotiation, the Memorandum of Agreement of December 1, 1962, providing that the third seat in the cockpit should be filled by a "Flight Officer," with the engineers entitled to priority for that post, was an achievement for the Chapter as well as for American. Yet, as everyone knew, this plan could become effective only as part of a complete agreement on salaries and working conditions for both groups. There was nothing wrong in American's insisting that the negotiations for this should take place in the same room. Although, as Judge Wyatt found and the majority repeats, the two groups had agreed in October that each should negotiate its own initial salaries, an agreement from which neither deviated, they were concerned not only with the absolute amounts but with the relationship. Beyond this the pilots had a direct interest in many matters being discussed with the engi-

2. In contending the contrary my brothers make much of the point that in defending against the Chapter's attack, both in the District Court and here, American's counsel advanced, as one of several arguments, that the Chapter had ceded its rights to the committee. Though this claim was specious and its making was ill-advised, annoyance about it should not warp our judgment; one of the very reasons why the claim is specious is that it does not comport with what American did.

neers. They too might serve as "flight officers" subject to the engineers' seniority rights; all new hirings for the third cockpit position were to have pilot qualifications; the proposed merged union was to speak for the "flight officers" in future negotiations; and one of the topics for negotiation was whether the engineers were to come into the pilots' pension plan and, if so, on what terms. If the engineers wished, as they unquestionably did, to negotiate on a basis involving concessions by the pilots and integration in a single group with them, American was not required to bargain separately rather than together.

The relevant part of the story here begins with a completely harmonious joint negotiation in November, 1962, leading up to the December 1 Memorandum initialed by the three parties. This showed exactly how everyone intended matters to proceed. The final outcome was to be a single agreement covering all cockpit personnel, which would indeed be signed by a representative of the merged group, presumably O'Connell. But no such signing would occur until the Chapter had actually executed the Memorandum, along with ALPA and American, in the places provided to that end.

With this background it was by no means unnatural that O'Connell, the prospective future head of the merged group, should occasionally have been the mouthpiece for proposals for the engineers formulated by the Chapter. Sometimes the parties proceeded in one way, sometimes in another. Thus, on January 31 the Chapter itself submitted a modified wage proposal. Two days later, it submitted one beginning "The Joint Committee representing the cockpit crew members in the current negotiations to settle the crew complement issue on American Airlines make the following counterproposal based on the assumption that they are merging with the Pilots in an overall settlement of the crew

complement issue." When this was rejected, the Chapter submitted another proposal on February 6, beginning "The Flight Officers make the following proposal * * *." Since the Chapter's negotiators were unavoidably absent on February 11, this afforded an ideal opportunity for American to deal behind their backs if it had any thought of doing that. Instead American's contemporaneous notes recite that Schoonover, a representative of the NMB, "presented the Company with the Engineers' latest proposal * * *. Company registered objections to continued discussion with the Engineers absent and not due until Wed." "WBW [Whitacre] suggested we might be attempting too much. Perhaps we should just work an agreement with the pilots to drop the Second Officer and sign separately with the Engineers for what they can get. Lyons [a pilot] suggested that in Engineers' absence, we might work on open sections. WBW not agreeable. Prefers to call the Engineers in and button up the wage deal so the Company will have an idea of its costs * * * O'Connell agreed F/E's should come in. Schoonover called Schwartz to arrange, couldn't reach. Contacted Manning who agreed to have his committee in by 10 A.M. tomorrow." On February 12 O'Connell again spoke for the engineers; the full text of Petree's testimony as to this episode gives a quite different impression from the summary in the majority opinion. Whitacre testified that he had at least one session with the flight engineer committee alone, as the notes of February 5 show; that the Company made a flight engineer pay proposal to the full committee on February 13; that O'Connell then acted as the flight engineers' spokesman; and that the discussion was resumed in full committee on the following day.

The majority cite not one word of evidence that O'Connell ever advanced any proposal affecting the engineers'

salaries or working conditions save at their request or that he attempted to bind them to anything without their assent. Indeed my brothers concede, fn. 2, "O'Connell did not purport to represent the flight engineers," and Manning's own testimony, also cited, was "that they [American] would only talk about our wages through Mr. O'Connell *or through the Joint Committee.*" (Emphasis supplied.) When Whitacre told the engineers on February 26 that he considered they had agreed to a pay proposal through the Joint Committee, there is no reason to doubt the sincerity of his belief that they had.[3] Moreover, the very nature of the Joint Committee precluded its acting as such. It had no formal constitution and its composition varied from day to day. On February 5 only the engineers attended, on February 11 only the pilots. Usually more pilot than engineer representatives were present, but there is no suggestion that the Chapter could not have sent more—or that this would have had any consequences, one way or the other. After the split between ALPA and the American pilot group, American made no attempt to sign with what remained of the committee as representing the pilots; it awaited the formation of Allied and action by the NMB under §2 Ninth. It

3. Whitacre also conceded that he had told the engineers that retroactive pay under their 1961 reopener would have to be settled through the joint committee. But it is plain that he was talking about retroactive pay as part of a general settlement and there was no reason to think that the pilot members would have played any part in the negotiation. Whitacre had told Schwartz, the Chapter's counsel, on February 1, "I have no intention of taking away your rights under the Railway Labor Act. If you want to negotiate wages separately we will talk but the benefits of the pilot agreement go out the window." This was uncontradicted and is thoroughly consistent with the entire record. A separate negotiation that would not place an engineer in the third cockpit seat was just what the Chapter did *not* want.

defies common sense to think it ever expected that either the whole committee or the rump could bind the engineers.[4]

We are now in a position to analyze the judge's "critical finding" that "From at least as early as January 31, 1963" American refused to bargain. This being a mixture of law and fact, one cannot be sure whether he thought American had violated a legal duty by insisting on joint bargaining or that it had done something more. If the former, his conclusion was wrong as a matter of law; if the latter, it would be "clearly erroneous" as a matter of fact. An appellate court need not hesitate to say this when, as here, despite my brothers' repeated suggestions of unspecified issues of credibility, the only real question is the characterization of what was admittedly said and done: *E. F. Drew & Co.* v. *Reinhard,* 170 F. 2d 679, 683-84 (2 Cir. 1948); *Orvis* v. *Higgins,* 180 F. 2d 537 (2 Cir.), cert. denied, 340 U. S. 810 (1950). The standard in reviewing the judgment of a judge is not at all like that in reviewing a verdict or the conclusions of an administrative agency. In the classical formulation, "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *U. S.*

4. A point is made over the fact that in a letter dated January 28, 1963, Whitacre used the verb "recognized" with respect to the Joint Negotiating Committee. The letter was written to Ruby, President of ALPA; its purpose was to explain why American would not comply with his request to start a new negotiation with the ALPA central office and eliminate the Joint Committee in which the Chapter was happily participating. Since Whitacre's letter envisioned no change in the current method of negotiation, there was no need for concern by Schwartz, to whom he had courteously sent a copy, as he did also to Manning and to Chairman Edwards of the NMB. But since Schwartz' letter of January 29 proposing a continuation of the joint negotiation was unexceptionable, there was equally no occasion for Whitacre to reply.

Gypsum Co., 333 U. S. 364, 395 (1948). And the error, whether it be called of law or of fact, in the judge's conclusion that American violated its duty in the period between January 31 and February 28 when the joint committee sessions were proceeding vitiates his conclusions with respect to subsequent periods.

American's opener of February 28 stated that "In accordance with the current negotiations with the Joint Committee of pilot and flight engineer representatives" on the crew complement agreement, the company made various proposals as to the third cockpit position and also that "Cockpit crew members on all aircraft will be consolidated into one craft or class covered by a single basic agreement." It "suggested"—not the strongest verb in the English language—"that bargaining on the above proposals continue under the auspices of the Joint Committee and Mr. Leverett Edwards, Chairman of the National Mediation Board." This was surely a strange proposal to be made by the brazen violator of the Railway Labor Act depicted by the majority—criminals generally do not solicit the presence of the cop. On March 1 the complaint in the *Ruby* action against American was served; if ALPA prevailed in that action, any possibility of a settlement dispensing with the C and I requirement for the third cockpit position would vanish. On March 5 representatives of the engineers met with Chairman Edwards of the NMB to discuss the effect of the action on the negotiations. He is reported to have said that "he thought that was real good, that he thought it was fine that we all go to the court and find out just who represented who around here. In other words, he said we should have a ruling on who the bargaining agents legally are."[5] He also "suggested that we just stop negotiations

5. It is evident that Chairman Edwards was referring only to the bargaining agent *for the pilots*; the complaint in the *Ruby* action had raised no issue as to the flight engineers.

until this ruling was made." There is double hearsay testimony as to Edwards' having said on the following day that he had talked with Whitacre who "wouldn't yield on this joint committee concept and that he was not interested in proceeding with the Flight Engineers as an independent bargaining agent." Edwards "suggested that we [the engineers] try meeting with the company, and if the company didn't want to call it a negotiating session, we just call it a bull session, but at least get with the company and try to carry on some talks." Such "bull sessions" were held on March 6, 8 and 12, in Edwards' presence; as the District Court found, "although many ideas were exchanged, nothing was settled."

This was the setting when, on March 7, Manning sent the company a letter, rather obviously intended for litigating purposes, which accused American of having insisted "on using the so-called 'Joint Committee' approach to deprive our Committee of its rights to an independent voice in the determination of Flight Engineer wages" and of an "intention to sign an agreement with the Pilots affecting Flight Engineers through this device." The Chapter therefore refused to go along with the suggestion in American's opener for continuing negotiations through the joint committee, although it wished not merely "to settle on wages" but "to arrive at a settlement encompassing all issues which relate to a satisfactory crew complement agreement and a basic working agreement," and had "no objection to the presence of Pilot representatives." The accusations as to American's past conduct were unwarranted. American had not insisted on negotiating through a joint committee unless the engineers wished the benefit of a settlement whereby the pilots abandoned their claim to the third cockpit position, a plan which at the time involved a merger of the two groups; it had not suggested that the committee

as such, or anyone other than the Chapter's representatives on the Committee, could settle the engineers' wages; and it had never intended to sign "an agreement with the Pilots affecting Flight Engineers" unless the engineers had become "pilots" by the Chapter's actually signing the December 1 Memorandum of Agreement. Before there was a fair opportunity to resolve the quiddities between continued negotiation through the "Joint Committee" and an altered form of negotiation with the engineers in the presence of pilots (and presumably another negotiation with the pilots in the presence of engineers), in the new situation created by the reopeners and the tense atmosphere generated by ALPA's request for an injunction against American's having any dealings with its own pilots, the Chapter moved on March 12 for leave to intervene and file a complaint in the *Ruby* action, annexing its March 7 letter as a supporting exhibit.

There was no occasion for the Chapter's thus rushing to the court house. A conclusion in the *Ruby* suit favorable to the plaintiff would have had the result of eliminating the joint committee, whereas the opposite one would have left matters as they were. It may be conceded that if litigation by the Chapter was necessary, it was convenient to have this in the *Ruby* action; but there was no emergency requiring it to take immediate resort to the courts rather than to explore the possibilities of some mutually acceptable form of negotiation after the dust raised by the bringing of the *Ruby* action had settled.

Apart from the fact that, as I should suppose, the validity of the Chapter's complaint must be tested by the circumstances existing when it was filed, I see nothing in subsequent developments to warrant American's condemnation. A party whose conduct has, on its reasonable view, been unreasonably challenged in court, need not exert itself

unduly for the benefit of the challenger while the litigation is pending. Stepard's telephone call to Lamond did not alter the Chapter's position that although it wanted a complete settlement, it declined a joint negotiation to that end; in any event I see no reason to think Judge Wyatt discredited Lamond's unchallenged testimony that he authorized Chairman Edwards to tell Schwartz he would meet with the engineers' committee as soon as permitted by his active schedule of court engagements—his deposition, which stretches over hundreds of pages, was taken on March 18 20, 22 and 26, and on March 19 all parties met with Chairman Edwards and with Mr. George Meany, President of the AFL-CIO. Likewise I see nothing sinister in American's giving O'Connell copies of the proposed single agreement at the point this had reached when the Chapter broke off negotiations, with the rates of pay for "flight officers" filled in with the figures which American believed to have been substantially agreed by the engineers' representatives on the Joint Committee. The law does not prohibit an employer's telling employees where negotiations stood when an impasse has been reached. *NLRB* v. *Norfolk Shipbuilding & Drydock Corp.*, 195 F. 2d 632, 637 (4 Cir. 1952); *NLRB* v. *Superior Fireproof Door & Sash Co.*, 289 F. 2d 713, 720 (2 Cir. 1961). O'Connell's testimony was that he intended to explain the documents, "after which some type of balloting will be established" for the men to "express themselves" and that he did not know "how it will be determined whether or not the flight engineers desire to join with the pilots in that organization"; if any such balloting were ever to occur, it would have had to be done under the supervision of the NMB pursuant to §2 Ninth of the Railway Labor Act. Least of all do I comprehend my brothers' ire over American's conduct in July. They complain that the contract between American and Allied

made no reference to the pay of the engineers, although they might well have cause for complaint if it had, as they also seem to charge. What American did obtain from its pilots was an agreement for conversion from a four-man to a three-man jet crew consistent with the December 1 Memorandum of Agreement that Manning had initialed, and a letter from Allied protecting the rights of the engineers to the third seat, which I quote in the margin.[6] It was precisely because this important matter of the crew complement had now been settled, not in conflict with the desires of the engineers but exactly in accord with them, that American no longer felt obliged to insist on joint bargaining and immediately advised that it would resume with the Chapter alone—peculiar conduct for a company which allegedly was using strong-arm tactics and, for reasons not explained by the majority, now "thought the flight engineers were at its mercy."

(2) Affirmance here is an invitation to parties in airline or railroad bargaining disputes to take to the courts con-

6. "In connection with the pilot contract being signed today, the position of the Allied Pilots Association concerning the flight engineers on American Airlines should be made clear to the company. It is not our intention that the documents signed today be interpreted as covering, or in any way jeopardizing, the rights of the American flight engineers.

"If at any time in the future the American Airlines flight engineers indicate a desire to become part of the American pilot group and they have so indicated by the positive action of a majority of their group that they wish to join with us and to have one union in the cockpit, the Allied Pilots Association will accept all American flight engineers as pilot members, on fair and reasonable terms respecting the rights of both the flight engineers and the pilots. These terms shall include guaranteeing the priority to each flight engineer, in accordance with his seniority to the third seat on all aircraft operated by the company with three or more cockpit crew members, and the right to nondiscriminatory representation."

troversies as to which Congress directed that resolution should be sought under the supervision of the NMB.

The cases in which judicial intervention under the Railway Labor Act has been deemed proper despite the absence of express provision to that end fall into several categories. There are the cases, of which *Texas & N. O. R.R.* v. *Brotherhood of Ry. Clerks*, 281 U. S. 548, 565-66 (1930), is the progenitor, involving specific and then unique directives for maintaining the *status quo* in a labor dispute. See *Chicago, R. I. & P. R.R.* v. *Switchmen's Union*, 292 F. 2d 61, 66 (2 Cir. 1961), cert. denied, 370 U. S. 936 (1962). There are the decisions, stemming from *Steele* v. *Louisville & N. R.R.*, 323 U. S. 192 (1944), and *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210 (1944), which concern racial discrimination by bargaining representatives, and those relating to the use of union funds for political purposes. *International Ass'n of Machinists* v. *Street*, 367 U. S. 740 (1961). There is the principle that a court may forbid either party's violating the provisions for compulsory arbitration of a "minor dispute." *Brotherhood of Railroad Trainmen* v. *Chicago River & I. R.R.*, 353 U. S. 30 (1957); *Brotherhood of Locomotive Engineers* v. *Louisville & N. R.R.*, 373 U. S. 33 (1963). These lines of authority afford no support for intervention here, since none involves the courts in the intricacies of labor-management disputes. The only Supreme Court precedent in any way relevant is thus *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515 (1937).

When the facts in the *Virginian* case are analyzed, the difference between it and the instant case, even on the unfavorable view of American's conduct taken by the majority, outweigh the similarities. There the district court had found, 11 F. Supp. 621, 624-27 (E. D. Va. 1935), and had been sustained by the Court of Appeals in finding, 84 F. 2d 641, 643 (4 Cir. 1936), continued refusal by the

railroad to confer in any way with a union certified by the NMB after an election in which it had been strenuously opposed by the railroad, and active sponsorship both to the defeated union and to a new one later organized. See also 300 U. S. 539-42. The NMB had done everything it possibly could; unless an injunction issued, the processes of the Railway Labor Act would have been stopped before having a chance to operate. Here American and the Chapter were engaging in a semantic quibble. Everyone agreed that the pilots and the engineers ultimately must be brought into line in some way; American, on the worst possible view, wanted to bargain with a joint committee "representing" pilots and engineers, whereas the Chapter wanted to bargain for the engineers separately but with the pilots present. Assuming, contrary to my belief, that the Chapter could properly insist on this, the gap was scarcely so wide that all possibility of the NMB's bridging it by mediation pursuant to §5 First was *a priori* excluded. Yet the Chapter invoked the judicial process twelve days after exchange of the 1963 openers, before any of the machinery provided in the Railway Labor Act had a fair chance to operate. Judicial refusal to entertain such a complaint would by no means leave the plaintiff without remedy, as it would have in the *Virginian Ry.* case; any serious assertion by American that some other entity could bind the flight engineers would have led ultimately to action by the NMB under §2 Ninth in which the legality of American's previous conduct would be investigated.

Courts are ill equipped to assist in solving controversies like this; I cannot help thinking that the diversion of the energies of the parties incident to compiling this enormous record, with 21 days of depositions or hearings, more than 3600 pages of depositions and trial transcript and hundreds of exhibits, in which every nuance of the negotiations was explored in tiresome detail, and the attending

exacerbations, have postponed rather than expedited a solution of the engineers' problems—not to speak of the drain on the time of an over-burdened district court. The net result of all this activity has been the dismissal of ALPA's complaint[7] and an order requiring American to treat with the Chapter as it was then doing, and had been willing to do in a joint negotiation when the Chapter went to court. Meanwhile, save for whatever progress may have been made as a result of American's action of July 11, 1963, the processes of negotiation and mediation contemplated by §§2 First and Second, 5 and 6 of the Railway Labor Act have been at a standstill.

This picture does not square with my concept of the limited role of the courts in airline or railroad labor disputes, where Congress has chosen to rely so heavily on negotiation and mediation rather than on adversary proceedings. In other kinds of commerce as to which Congress has been far more prone to depend on the adversary process, see *Ruby* v. *American Airlines, supra*, 323 F. 2d at 254, a complaint like the Chapter's would take the form of a charge to the National Labor Relations Board; it would be processed only if administrative screening showed it to have probable merit; and it would come before the courts in advance of agency decision only in the rare case where suit was brought by the Board under §10(j) of the National Labor Relations Act, 29 U. S. C. §160(j).[8] As

7. It is recognized that a considerable portion of the record related to the dispute between ALPA on the one hand and American and the American pilots on the other. But we indicated in *Ruby*, 323 F. 2d at 256, that the complaint in that case should have been dismissed rather early in the game when it appeared that a dispute existed which would require action by the NMB under §2 Ninth.

8. The last three Annual Reports of the National Labor Relations Board reveal only one petition for injunctive relief for refusal to bargain in 1960, p. 148, none in 1961, p. 185, and four in 1962, pp. 233-34.

the Supreme Court said in *General Committee* v. *Missouri-K.-T. R.R.*, 320 U. S. 323, 333 (1943), in a slightly different context, "The inference is strong that Congress intended to go no further" to involve the courts in such matters "than the express provisions of the [Railway Labor] Act indicate." When a complaint claims only a violation of the general duties imposed on labor and management by the first six paragraphs of §2 of the Railway Labor Act, a court ought to make sure that a plaintiff's resort to the judicial arena will advance rather than hinder the purposes of the Act. Before it proceeds with the case it should demand a preliminary showing of a serious violation not susceptible of resolution through the machinery of the Act, and should require that showing to be made good before it grants a judgment. See also *Ruby* v. *American Airlines, Inc., supra,* 323 F. 2d at 254-56.

(3) When an injunction is sought, judicial restraint is called for not only by the scheme and structure of the Railway Labor Act but by the Norris-La Guardia Act as well, 29 U. S. C. §§101-15. It is true enough that, as said in the *Virginian Ry.* case, 300 U. S. at 563, the provisions of the Railway Labor Act "cannot be rendered nugatory by the earlier and more general provisions of the Norris-La Guardia Act," and also "that the Norris-La Guardia Act cannot be read alone in matters dealing with railway labor disputes." *Brotherhood of Railroad Trainmen* v. *Chicago River & I. R.R., supra,* 353 U. S. at 40. But, as we held in *Chicago, R. I. & P. R.R.* v. *Switchmen's Union, supra,* 29 F. 2d at 64-67, relating to an anti-strike injunction for an alleged union violation of its duty to bargain, that is a long way from saying that the Norris-La Guardia Act is to be wholly disregarded whenever an injunction is sought to prevent an alleged violation of the Railway Labor Act. See *Order of Railroad Telegraphers* v. *Chicago & N. W.*

Ry., 362 U. S. 330, 338 and fn. 14 (1960); *Missouri-Illinois R.R.* v. *Order of Railway Conductors*, 322 F. 2d 793, 798 (8 Cir. 1963). The policy behind the Norris-La Guardia Act is strong and persistent, as the recent decision in *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195 (1962), attests. Compare *Publishers' Ass'n of New York City* v. *New York Mailers' Union*, 317 F. 2d 624, 626-28 (2 Cir.), cert. granted, 375 U. S. 901 (1963). "* * * Congress was intent upon taking the federal courts out of the labor injunction business except in the very limited circumstances left open for federal jurisdiction under the Norris-La Guardia Act." *Marine Cooks* v. *Panama SS. Co.*, 362 U. S. 365, 369 (1960).

In contrast to the check-off appeal, No. 28461, this day decided, I see nothing in the circumstances here that would cause application of the Norris-La Guardia Act to conflict with the provisions of the Railway Labor Act, see 300 U. S. at 563; to the contrary, the policies of the two statutes coincide. Yet even if we assumed *arguendo* that the Chapter had met the requirement of §7(a), 29 U. S. C., §107(a), of showing that "unlawful acts" had been threatened or committed, I cannot see how it could be found that when the Chapter sought an injunction, it had made "every reasonable effort to settle" the dispute as to the handling of its opener of February 28, 1963, "either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration" or that, when the injunction issued on August 19, 1963, unlawful acts would be "committed * * * or * * * continued unless restrained" or that "substantial and irreparable injury to complainant's property" would have followed from denial, as §§8 and 7(a) and (b) of the Norris-La Guardia Act require. Quite apart from that statute, a party asking injunctive relief (as distinguished from one merely seeking to avoid dismissal for mootness) "must satisfy the court that relief is needed * * *, that there exists some cognizable

danger of recurrent violation, something more than the mere possibility which serves to keep the case alive . . . . To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations," *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953). Even if I am wrong in concluding that American did not violate the Railway Labor Act, any violation consisted of a few unclear expressions which American had withdrawn by its letter of July 11; and the consummation of its negotiations with its pilots ended any need for the joint bargaining over which the whole squabble revolved. It is no answer that the injunction does little harm; apart from all else, for reasons previously outlined, efforts to involve a federal court in airline or railroad labor disputes in the absence of any compelling need for intervention ought not be thus encouraged.

For these three reasons, any one of them sufficient, I would reverse.

Order of the United States Court of Appeals For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of February one thousand nine hundred and sixty-four.

Present:

Hon. J. Edward Lumbard,
Chief Judge,
Hon. Harold R. Medina,
Hon. Henry J. Friendly,
Circuit Judges.

Charles H. Ruby, as President of the Air Line Pilots Association, International, and Air Line Pilots Association, International,

Plaintiffs,

v.

American Airlines, Inc.,
Defendant-Appellant,

Nicholas J. O'Connell, Jr., etc., et al.,
Additional Defendants-Appellants,

Joseph V. Manning, etc., et al.,
Intervenors-Appellees.

Order of the United States Court of Appeals For the Second Circuit

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to the intervenors-appellees.

A. Daniel Fusaro
Clerk

Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

CHARLES H. RUBY, as President, etc.,
Plaintiffs,

v.

AMERICAN AIRLINES, INC.,
Defendant-Appellant,

and

NICHOLAS J. O'CONNELL, *et al.*,
Additional Defendants-Appellants,

and

JOSEPH V. MANNING, as President, etc.,
Intervenors-Appellees.

Arthur M. Wisehart, New York, N. Y.,
for appellant American Airlines, Inc.

Petition denied.

J. E. L.
H. R. M.
U.S.C.JJ.

I dissent.

H. J. F.
U.S.C.J.

Apr 10 1964

Petition for Rehearing In Banc

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

CHARLES H. RUBY, as President, etc.,
Plaintiffs,

v.

AMERICAN AIRLINES, INC.,
Defendant-Appellant,

and

NICHOLAS J. O'CONNELL, *et al.*,
Additional Defendants-Appellants,

and

JOSEPH V. MANNING, as President, etc.,
Intervenors-Appellees.

Arthur M. Wisehart, New York, N. Y.,
for appellant American Airlines, Inc.

As no active circuit judge has requested that this case be reheard in banc, and as Judge Medina, who is qualified to vote thereon by virtue of 28 U. S. C. §43 votes to deny, the petition is denied.

J. EDWARD LUMBARD
Chief Judge

Apr 10 1964

Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

CHARLES H. RUBY, as President, etc.,
Plaintiffs,

v.

AMERICAN AIRLINES, INC.,
Defendant-Appellant,

and

NICHOLAS J. O'CONNELL, *et al.*,
Additional Defendants-Appellants,

and

JOSEPH V. MANNING, as President, etc.,
Intervenors-Appellees.

Martin C. Seham, New York, N. Y.,
for additional appellants Nicholas J.
O'Connell, *et al.*

Petition denied.

J. E. L.
H. R. M.
U.S.C.JJ.

I dissent.

H. J. F.
U.S.C.J.

Apr 10 1964

Petition for Rehearing In Banc

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

CHARLES H. RUBY, as President, etc.,
Plaintiffs,

v.

AMERICAN AIRLINES, INC.,
Defendant-Appellant,

and

NICHOLAS J. O'CONNELL, *et al.*,
Additional Defendants-Appellants,

and

JOSEPH V. MANNING, as President, etc.,
Intervenors-Appellees.

Martin C. Seham, New York, N. Y.,
for additional appellants Nicholas J.
O'Connell, *et al.*

As no active circuit judge has requested that this case be reheard in banc, and as Judge Medina, who is qualified to vote thereon by virtue of 28 U. S. C. §43 votes to deny, the petition is denied.

J. EDWARD LUMBARD
Chief Judge

Apr 10 1964

Order Extending Time to File Petition for Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1964

AMERICAN AIRLINES, INC., *et al.*,
Petitioners,

vs.

JOSEPH V. MANNING, etc., *et al.*

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 5, 1964

/s/ JOHN M. HARLAN
Associate Justice of the Supreme Court of the United States.

Dated this 1st day of July 1964

Order of the District Court With Respect to Petitioner American Airlines, Inc.

[Same Title]

Intervenors' motion for a preliminary injunction in their favor and against the defendant having come on for hearing, and the Court having considered the pleadings, the affidavits submitted in support of said motion and in opposition thereto, the evidence introduced in open court, and the memoranda of law submitted by the parties, and the Court having separately made and filed findings of fact and conclusions of law, it is

Ordered that defendant, American Airlines Inc. its officers, agents and employees, be and hereby are enjoined and restrained until final hearing and judgment:

1. From engaging in negotiations and collective bargaining concerning rules, rates of pay and working conditions of the employees of defendant American Airlines, Inc., or any of them, employed in the craft or class of Flight Engineers, with any person, organization or group, other than the American Airlines Chapter, Flight Engineers' International Association, AFL-CIO.

2. From making, publishing or implementing, or in any manner causing to be made, published or implemented any agreement covering the rules, rates of pay or working conditions of the employees of defendant American Airlines, Inc., or any of them, employed in the craft or class of Flight Engineers, except such agreement or changes therein as may result from collective bargaining between defendant American Airlines, Inc., and the American Airlines Chapter, Flight Engineers' International Association, AFL-CIO.

Order of the District Court With Respect to Petitioner American Airlines, Inc.

3. From, directly or indirectly, in any way, manner of form, or by any means whatsoever, interfering with, influencing or coercing any of its flight engineer employees with respect to their free and untrammeled right of selecting or designating their representative or representatives for the purpose of making and maintaining agreements with American Airlines, Inc., relating to rules, rates of pay and working conditions, as well as for any and all other purposes of the Railway Labor Act (45 U. S. C. A. §151 and following):

and it is further

ORDERED that defendant American Airlines, Inc., by and through its duly authorized officers, agents, and employees, shall treat with American Airlines Chapter, Flight Engineers' International Association, AFL-CIO, and exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions respecting the craft or class of flight engineers; and it is further

ORDERED that under Fed. R. Civ. P. 65(c) intervenors are to give security in the form of a bond, with corporate surety, to be approved by the Court in the sum of one thousand dollars ($1000) conditioned for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Nothing in this order is intended to limit any rights which any party may have under the Railway Labor Act (45 U. S. C. A. §151-188).

Dated: New York, New York
August 19, 1963

INZER B. WYATT
United States District Judge

Order of the District Court With Respect to Petitioners O'Connell, *et al.*

[Same Title]

Intervenors' motion for a preliminary injunction in their favor and against the additional defendants having come on for hearing, and the Court having considered the pleadings, the affidavits submitted in support of said motion and in opposition thereto, the evidence introduced in open court, and the memoranda of law submitted by the parties, and the Court having separately made and filed findings of fact and conclusions of law, it is

Ordered that the additional defendants Nicholas J. O'Connell, Jr., individually and as Chairman of the Master Executive Council of the pilots in the service of American Airlines Inc., and the Negotiating Committee of said pilots, consisting of Richard Lyons, Robert T. Guba, Joseph Garvey, Paul Atkins and Nicholas J. O'Connell, Jr., ex officio, and their agents and employees, be and hereby are enjoined and restrained until final hearing and judgment:

1. From engaging in negotiations and collective bargaining concerning rules, rates of pay and working conditions of the employees of defendant American Airlines, Inc., or any of them, employed in the craft or class of Flight Engineers.

2. From making, publishing or implementing, or in any manner causing to be made, published or implemented any agreement covering the rules, rates of pay or working conditions of the employees of defendant American Airlines, Inc., or any of them, employed in the craft or class of Flight Engineers.

Order of the District Court With Respect to Petitioners O'Connell, et al.

3. From, directly or indirectly, in any way, manner or form, or by any means whatsoever, interfering with, influencing or coercing any of the flight engineer employees of defendant American Airlines, Inc. with respect to their free and untrammeled right of selecting or designating their representative or representatives for the purpose of making and maintaining agreements with said American Airlines, Inc., relating to rules, rates of pay and working conditions, as well as for any and all other purposes of the Railway Labor Act (45 U. S. C. A. §151 and following);

and it is further

ORDERED that under Fed. R. Civ. P. 65(c) intervenors are to give security in the form of a bond, with corporate surety, to be approved by the Court in the sum of Two hundred and Fifty Dollars ($250) conditioned for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Nothing in this order is intended to limit any rights which any party may have under the Railway Labor Act (45 U. S. C. A. §151-188).

Dated: New York, New York, August 19, 1963.

INZER B. WYATT
United States District Judge

Opinion of the United States Court of Appeals For the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Cal. No. 419—October Term, 1962

(Argued September 5, 1963 Decided September 16, 1963)

Docket No. 28417

CHARLES H. RUBY, as President of the AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, an unincorporated association,

Appellants,

v.

AMERICAN AIRLINES, INC.,

Appellee,

and

NICHOLAS J. O'CONNELL, JR., individually, and as Chairman of the Master Executive Council of the pilots in the service of AMERICAN AIRLINES, INC., and the Negotiating Committee of said pilots, consisting of RICHARD LYONS, ROBERT T. GUBA, JOSEPH GARVEY, PAUL ATKINS and NICHOLAS J. O'CONNELL, JR., ex officio,

Additional Appellees.

Before:

CLARK, WATERMAN and FRIENDLY, *Circuit Judges.*

Appeal by plaintiffs from a judgment of the District Court for the Southern District of New York, Inzer B. Wyatt, Judge, dismissing their complaint in an airline labor dispute for lack of jurisdiction over the subject matter. Affirmed.

HENRY WEISS (Cohen and Weiss), New York, N. Y., (Herbert A. Levy, of Counsel), *for Appellants.*

ARTHUR M. WISEHART, New York, N. Y. (George A. Spater, of Counsel), *for Appellee American Airlines.*

MARTIN C. SEHAM, New York, N. Y., *for Additional Appellees.*

CARL EARDLEY, MORTON HOLLANDER and HOWARD E. SHAPIRO, Attorneys, Dept. of Justice, Washington, D. C., *filed Brief Amicus Curiae on behalf of the National Mediation Board.*

FRIENDLY, *Circuit Judge*:

This appeal again raises the problem as to the role of the courts with respect to labor disputes in an industry governed by the Railway Labor Act, 45 U. S. C. §§151-188. The Air Line Pilots Association (ALPA), a nationwide union of airline pilots, endeavored in this action to protect its historic status as bargaining representative of American Airlines' pilots, primarily by seeking injunctions that would prevent the defendants—American and a negotiating committee of American pilots which later became the nucleus of a new union—from dealing with one another, and would require American to negotiate with ALPA instead. We affirm the conclusion of the District Court that ALPA made no case warranting judicial intervention in this area, which Congress has so largely committed to the National Mediation Board.

In view of Judge Wyatt's comprehensive statement of the facts we shall limit ourselves to those we deem most important.[1] American Airlines' last pilot contract before

1. Judge Wyatt's opinion also dealt with a related dispute between American and the Flight Engineers' International Association. This is not before us, and we intimate no views in its regard.

the instant dispute was made with the air line pilots in its service "as represented by the AIR LINE PILOTS ASSOCIATION, INTERNATIONAL", which, as the contract recited, "has shown satisfactory proof to the Company of the fact that it represents more than a majority of the air line pilots of the Company." The contract was to be effective until July 21, 1960, and was to renew itself annually thereafter unless written notice of intended change was served, pursuant to §6 of the Railway Labor Act, 45 U. S. C., §156, at least 60 days prior to July 21 in any year. In March, 1961, American sent such a notice to the president of ALPA, and ALPA sent such a notice to American.

To appreciate the relationship of the parties and the source of the controversy, some understanding of ALPA's structure is required. The basic unit is a Local Council composed of the member pilots of a single airline at an operating base. Certain officers of the Local Councils constitute the airline's Master Executive Council (MEC); this body is "empowered to make the final decision on any problem or problems of the members of that air line, except as provided elsewhere in the Constitution and By-Laws." The Chairman of the MEC is "An ex officio member of the Negotiating Committee." The Negotiating Committee is not otherwise described in the Constitution and By-Laws, but the ALPA Policy Manual says that it shall be selected by the MEC on each airline, and that it "shall have the authority to conclude an agreement subject to the provisions of Article XVIII of the Constitution and By-Laws," which provides that conferences or negotiations to make employment agreements shall not be initiated, carried on, or concluded in the name of ALPA without the prior approval of the Executive Committee or the President, and that no such agreement shall become effective unless signed by the President or some other officer authorized

by one of ALPA's central governing bodies. The latter are a Board of Directors containing representatives of all the Local Councils, an Executive Board containing the chairmen and vice-chairmen of all the Master Executive Councils, and an Executive Committee. Thus, while the established procedure is for an agreement with an airline to be negotiated by a committee of its own pilots, the negotiation takes place under the eye of ALPA's central organization and the agreement is not concluded without the approval of the upper echelon of ALPA's policy makers.

The negotiations that began in 1961 between American and a pilots' negotiating committee, formed in accordance with ALPA policy,[2] were complicated from the outset by the controversy as to cockpit crew complement on jet aircraft which has occasioned a number of disputes and strikes and has been the subject of two decisions of this court. *Pan American World Airways* v. *Flight Engineers Int'l Ass'n*, 306 F. 2d 840 (2 Cir. 1962); *Flight Engineers Int'l Ass'n* v. *Eastern Air Lines*, 311 F. 2d 745 (2 Cir. 1963). On October 21, 1961, American notified the ALPA negotiating committee that it accepted the recommendations of a commission, appointed by President Kennedy and chaired by Professor Nathan Feinsinger, that the cockpit crew on jet aircraft should consist of three persons (as desired by the airlines) rather than four; that a flight engineer serving as one of the three should be possessed of a Commercial Pilot's Certificate and Instrument Rating ("C and I") (as desired by ALPA); and that ALPA and the Flight Engineers' International Association should merge, with the job equities of the pilots and engineers reasonably protected. On November 7, 1961, the President

2. It was customary for an employee of ALPA to attend such meetings as "staff negotiator." Later, in November, 1962, ALPA withdrew its representative from the discussions between American and its pilots.

of ALPA wrote the National Mediation Board (NMB) that the crew complement problems were "but minor issues on American Airlines" as compared with pilot proposals on retirement and working conditions, notably a reduction of hours. American took the position that it could not grant these if it also had to undergo the expense of training its flight engineers up to the C and I requirement. After mediation by the NMB proved unsuccessful and ALPA declined a suggestion of arbitration which American had accepted, the NMB, on July 18, 1962, notified the parties that its services had terminated. This left American's pilots free to strike after the lapse of 30 days, 45 U. S. C. §155 First, unless an Emergency Board were appointed as provided in 45 U. S. C. §160.

Shortly before this, the Secretary of Labor had achieved a break-through on the problem of cockpit crew complement as to TWA, on the basis of the Feinsinger Commission's recommendations. American's engineers approved these terms but the Company informed the Department of Labor that this settled nothing, since the American pilots had preferred a reduction in hours and other benefits to the four man crew and had recently expressed a preference that American spend its money for such benefits rather than in qualifying flight engineers for the full C and I certificate.[3] During July, 1962, various meetings were held between the Labor Department, Chairman Edwards of the NMB, the company, the negotiating committee (including the ALPA staff representative), and Ruby who had

3. ALPA's interest in the C and I rating for the third member of the cockpit crew reflected its position that this was desirable for operating reasons, despite less stringent government requirements, and doubtless also a belief that some flight engineers would not qualify for the higher rating, thereby leaving more cockpit positions for the pilots and thus cushioning the impact of the reduction in pilot positions threatened by the introduction of the larger and faster jets.

recently become president of the ALPA. In the course of these, O'Connell, Chairman of the American MEC and one of the pilot negotiators, expressed the preferences of the American pilots along the lines just stated. At later meetings, O'Connell proposed that, if American would grant its pilots reduced hours and an improved retirement plan, they would agree to the three man crew without insisting on the C and I, and would bring the flight engineers into ALPA as the Feinsinger Commission had proposed. Since the pilots' willingness to relinquish the C and I requirement conflicted with what had been ALPA policy, American raised the question whether they could secure an ALPA approving signature; the negotiating committee expressed optimism. During November the Company met with the pilots and the flight engineers jointly; these conferences led to a memorandum of agreement on crew complement, initialed on December 1 by representatives of the three parties, along the lines indicated.

Meanwhile relationships between the pilots' negotiating committee and the ALPA central organization were deteriorating. Since by this time many other major air lines had concluded agreements incorporating the C and I requirement, ALPA objected strenuously to the nonconforming negotiations of the American pilots and sought, both by resolution and by appeal to the NMB, to terminate the American negotiations until the question of crew complement was resolved in writing to its satisfaction. ALPA's efforts did not prevent initialing of the December 1 memorandum but, on December 6, American agreed with Ruby, over the dissent of O'Connell, that negotiations be recessed until January, 1963—apparently for the purpose of giving the ALPA negotiating committee and the ALPA central organization time to work out their differences. Nothing was accomplished. At meetings at ALPA's Chicago head-

quarters early in January, Ruby and the ALPA Executive Committee remained adamant on the C and I, whereas the American MEC resolved unanimously to authorize the negotiating committee to conclude an agreement without this. On January 11, 1963, Ruby notified the committee and American that no negotiations could occur without his approval. The same day O'Connell requested resumption of negotiations and said that any agreement would be submitted for ratification by American pilots, acting with a 75% vote which, he asserted, could readily be secured. American consulted Chairman Edwards of the NMB; he advised that the company had no choice but to bargain with the committee. Negotiations were resumed on January 16, with the ALPA staff member absent but with a Mediation Board representative always present. Ruby countered with a series of communications apprising all parties of ALPA's view that the negotiations were unauthorized and endeavoring unsuccessfully to initiate a negotiation with the ALPA home office. American asked how a new committee of American pilots could be designated; Ruby had no solution save "bringing the existing committee in or whatever arrangement was necessary." In early February the ALPA Executive Board adopted resolutions declaring that the American MEC and the negotiating committee "are not the bargaining representative of the American Airlines pilots" and directing Ruby or his representative to negotiate and conclude an agreement with American. Efforts by ALPA employees to join the negotiating sessions having proved abortive, it instituted this action, on March 1, 1963, seeking to enjoin American from bargaining with anyone other than the plaintiff. American reached an understanding with its pilots on March 15. The proposed agreements referred to ALPA and provided for signature by it, which could not occur unless

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ALPA, now confronted with a completed contract, should reverse its previous position.

The break was not long in coming. The American MEC unanimously ratified the March 15 agreements. Ruby, who was invited to some of the sessions, said he would not sign these or any other agreements not containing a C and I requirement for the third man. The MEC thereupon authorized the formation of a new organization, Allied Pilots Association, to represent the American Pilots.[4] On April 12, Allied sent out cards which would authorize it to be the collective bargaining representative of the American pilots and to seek certification under §2 Ninth of the Railway Labor Act, 45 U. S. C. §152 Ninth. ALPA amended its complaint to include O'Connell and the other members of the negotiating committee as additional defendants. On April 24 Allied filed an application with the NMB, stating that a representation dispute had arisen among American's pilots and asking for an investigation and certification under §2 Ninth; it claimed to have authorization cards from 1150 out of 1600 pilots.

The NMB promptly invited American and ALPA to submit any statements they cared to make. ALPA called the NMB's attention to this action, and the allegations of assistance, influence and coercion by American made therein. American filed a petition for leave to intervene and a letter giving its version of the facts and denying any improper conduct. On May 24, 1963, the NMB advised that Allied's application had been given a preliminary investigation by a mediator; that the Board, having "reviewed all the information now in its possession", was

4. Judge Wyatt found "There is no evidence that the Company suggested, encouraged or even knew in advance about the determination of the American pilots to leave ALPA over the 'C and I' issue and form their own organization."

"of the opinion no issues have been raised which warrant further preliminary proceedings" or deferral of the processing of Allied's application pending the outcome of current litigation; and that it had directed that the application be docketed as Case No. R 3619 and that a mediator be assigned for further handling in accordance with usual procedures.[5] After receipt of further letters from ALPA's attorney, the Board, on June 5, adhered to this position. On June 13, the mediator reported he had found acceptable authorization cards from 84% of the eligible pilots and recommended that a mail ballot election be held. NMB directed that such an election be conducted. This has not occurred due to an action brought by ALPA against the members of the Board in the District of Columbia wherein the NMB has been stayed from proceeding with the election pending determination in the action now before us.

Allied responded to ALPA's District of Columbia suit by demanding, on June 19, that American recognize it and sign the March 15 agreements. Its letter pointed out that the delays were resulting "in a financial gain to American Airlines" and corresponding detriment to the pilots since "working conditions obviously cannot be made retroactive." A further letter, of July 3, 1963, emphasized and amplified this position, alleging that the proportion of the pilots voting for representation by Allied was now more than 90% and making the pointed suggestion "There is no restriction on the freedom of American's pilots to enforce, by whatever means necessary, their right to be represented by an organization of their own choosing." On July 9,

5. Previously the case had been known as C-3351. We were informed at argument that the "C" Docket contains cases which are the subject of preliminary investigation whereas the "R" Docket is for cases which are thought may be ripe for a representation election. majority of the pilots have authorized Allied to act as

noting "There can be no question but that the overwhelming majority of the pilots have authorized Allied to act as their bargaining representative", American recognized Allied and signed the agreements.

Meanwhile the District Court was taking evidence in this action, the hearing (which included the related claim of the flight engineers) having consumed part or all of 21 court days and the transcript extending over nearly 3200 pages. In opinions dated August 12, 1963, Judge Wyatt denied ALPA's motion for a temporary injunction and directed the summary judgment dismissing the complaint for want of jurisdiction over the subject-matter from which this appeal is taken.

Mere statement of the facts makes it apparent that *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297 (1943), and the two other cases decided therewith, *General Committee* v. *Missouri-K.-T. R. Co.*, 320 U. S. 323 (1943), and *General Committee* v. *Southern Pacific Co.*, 320 U. S. 338 (1943), constitute a formidable obstacle to the maintenance of this action. The *Switchmen's* case[6] held that a district court was without jurisdiction to cancel a certification by the NMB, under §2 Ninth, that a particular union was the duly designated representative of certain employees, with whom "the carrier shall treat". Any attempt to distinguish the *Switchmen's* case on the basis that there has as yet been no certification of Allied runs counter to the consideration that a suit to review administrative action usually stands on a better footing than one whose maintenance would prevent an administra-

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6. This has been termed "Much the most important case holding that a statute inexplicitly precluded review," 4 Davis, Administrative Law Treatise 42 (1958). It is criticized by Davis and also by Jaffe, The Right to Judicial Review, 71 Harv. L. Rev. 401, 428-31 (1958).

tive agency from performing its statutory duty.[7] *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938); *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540 (1946). ALPA relies primarily on another basis of distinction, namely, that the trilogy in 320 U. S. related to jurisdictional disputes between unions rather than, as here, to action by an employer alleged to violate various commands of the Act, notably the mandate of §2 Fourth that an employer shall not "influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization * * *." Its two step arguments is, *first*, that, by offering economic inducements to cause its pilots to desert ALPA for Allied, American was guilty of the sort of conduct held to constitute an unfair labor practice under the National Labor Relations Act in *Medo Photo Supply Corp.* v. *NLRB*, 321 U. S. 678 (1944), and like cases, and, *second*, that since the Railway Labor Act affords no such opportunity as the National Labor Relations Act for a full administrative hearing and determination, which would result in disqualifying a union found to have benefitted from unlawful conduct by the employer,[8] the federal courts should fill the supposed statutory vacuum.

7. If, as is at least theoretically possible, the vote of the American pilots should favor ALPA rather than Allied, the decree sought would be unnecessary—save perhaps for the limited purpose of cancelling a contract made with a representative which turned out not to be one "duly designated." Compare *American Seating Co.*, 106 NLRB 250 (1953).

8. When a charge of such a practice, having *prima facie* merit, is filed before a representation election, the NLRB will customarily postpone the election until it has passed upon the charge. See *Surprenant Mfg. Co.* v. *Alpert*, 318 F. 2d 396, 397 (1 Cir. 1963), citing *United States Coal & Coke Co.*, 3 NLRB 398 (1937), and the NLRB's Third Annual Report (1939) 143.

We would be unable to take the first step in the argument if that issue required resolution. Whether or not we would have been obliged to sustain an administrative determination that American had violated the statute if one had been made, we would not make any such finding on our own account—much less set aside the District Judge's contrary one. The case differs essentially from *Medo*. Although the pilots' proposal to forego the C and I requirement in return for economic benefits was doubtless to American's liking, the offer came from the ALPA negotiating committee, and did so at a time when, as American was told, there was still basis for hope that the central organization would go along. American never conditioned its willingness to grant economic benefits upon the pilots' withdrawing from ALPA; on the contrary, a solution leaving them in ALPA would have facilitated merger of the flight engineers into that organization and an amicable disposition of the entire controversy. Rather than refusing to deal with the union's bargaining representative and negotiating with the employees directly, as the employer did in *Medo*, American dealt for months with the very group with which ALPA's Constitution and By-Laws and Policy Manual told it to deal; and when an impasse developed through ALPA's refusal to accept the results of the negotiation, a refusal wholly within its rights, ALPA was unable to supply a substitute negotiating committee that accorded with past practice and its own Policy Manual. American recognized Allied only when possessed of substantial evidence that Allied represented an overwhelming proportion of its pilots and when threatened with a strike if it refused recognition. Under such circumstances recognition by an employer who has not been guilty of a relevant unfair labor practice need not wait certification, although he acts at peril of being right; the facts are far closer to those in

NLRB v. *Indianapolis Newspapers, Inc.*, 210 F. 2d 501 (7 Cir. 1954), cited in *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 72 fn. 8 (1956), and in *District 50, United Mine Workers* v. *NLRB*, 234 F. 2d 565 (4 Cir. 1956), than to those in *Medo*. Compare *NLRB* v. *Superior Fireproof Door & Sash Co.*, 289 F. 2d 713, 719 (2 Cir. 1961).

However, we need not decide this issue since we find that the distinction of the *Switchmen's* case asserted by ALPA is not legally sufficient on the facts here. In both cases the basic claim is of unlawful deprivation of the important rights to representation guaranteed by § 2—in the *Switchmen's* case by the Board's allegedly unlawful selection of a bargaining unit, here by the Board's allegedly unlawful condonation of illegal tactics by American. It was obvious almost from the beginning of this action that it concerned the proper representation of American's pilots, a subject which Congress has given the Mediation Board the duty to determine.

Appellants seek to bring themselves within two areas heretofore recognized as appropriate for judicial intervention in Railway Labor Act matters—the duty of the courts to require the carrier to bargain with the duly designated representative, *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515 (1937), and, very likely, when necessary, a duty to require the Mediation Board to do what Congress commanded, namely, to investigate and certify—the point reserved by the Supreme Court in the *M.K.T.* case, 320 U. S. at 336 fn. 12; cf. *Order of Railway Conductors* v. *Pennsylvania R. Co.*, 323 U. S. 166 (1944), and decided in *Air Line Dispatchers Ass'n* v. *National Mediation Board*, 189 F. 2d 685 (D. C. Cir.), cert. denied, 342 U. S. 849 (1951). The case does not fall within the first of these principles. For, even though we accept appellants' argument that, in the light of § 2 Second, Fourth and Sixth, it is not fatal that

ALPA never had been certified so as to come within the precise command of § 2 Ninth that the employer "treat with the representative so certified", the courts cannot properly require an employer to bargain with a previously designated representative in the face of a substantial representation dispute requiring the intervention of the Mediation Board under § 2 Ninth—a development which became an almost inevitable prospect within a few weeks after this action was brought on March 1 and crystallized into a certainty by late April.

Appellants have likewise failed to make a case for invoking the second possible judicial role. The Board's duty to investigate is a duty to make such investigation as the nature of the case demands. See *WES Flight Engineers Int'l Ass'n* v. *National Mediation Board*, 314 F. 2d 234, 237 (D. C. Cir. 1962), a decision which weighs heavily against ALPA's entire claim.[9] We are not required to decide whether relief for failure of the Board to make a proper investigation could ever be granted in an action to which the Board is not a party. For the record shows that the Board performed its duty. True, no testimony was taken, as it was in the *WES* case, but the Board's manner of investigation was not only as good but better under the circumstances. As we are told by an affidavit of its Assistant Executive Secretary, it utilized pleadings, exhibits, and portions of the record already made in this action, which each of the three members reviewed. In addition it had the important benefit of its own intimate knowledge of the negotiations, derived from the participation of its representatives therein. ALPA had told us of no additional material facts it would have presented if the Board had

9. For reasons indicated above, we find no merit in ALPA's distinction of the *WES* case on the basis that there the suit followed whereas here it preceded certification.

given it a further opportunity; its complaint relates not so much to the adequacy of the information before the Board as to the Board's conclusion that no wrong had been done. We see no more basis for judicial interference with that conclusion than with the conclusion in the *Switchmen's* case that the New York Central's yardmen should vote on a system-wide basis. See 320 U. S. at 301, 305. Compare *General Committee* v. *Missouri-K.T.R. Co., supra*, 320 U. S. at 337; *Brotherhood of Railway and Steamship Clerks* v. *United Transport Service Employees*, 320 U. S. 715 (1943), *reversing per curiam* 137 F. 2d 817 (D. C. Cir. 1943); *UNA Chapter, Flight Engineers Int'l Ass'n* v. *National Mediation Board*, 294 F. 2d 905 (D. C. Cir. 1961), cert. denied, 368 U. S. 956 (1962); *Air Line Stewards Ass'n* v. *National Mediation Board*, 294 F. 2d 910 (D. C. Cir. 1961), cert. denied, 369 U. S. 810 (1962); *Flight Engineers Int'l Ass'n* v. *Eastern Air Lines, supra*, 311 F. 2d 745.

ALPA persistently reminds us how differently the case would have been treated if American had been a bus line subject to the National Labor Relations Act rather than an airline subject to the Railway Labor Act.[10] But the claim that the courts should do under the Railway Labor Act what Congress directed the NLRB to do under the National Labor Relations Act not only flies in the face of the difference in the language and scheme of the two statutes but ignores the diverse problems to which they were addressed. The Railway Labor Act constituted "legislation agreed upon between the railroads and the Brotherhoods and probably unique in having been frankly accepted as such by the President and Congress." "* * * [E]very stage in the evolution of this railroad labor code was progressively infused with the purpose of securing self-adjustment

10. It is, however, by no means clear that the National Labor Relations Board would have found *prima facie* merit in ALPA's complaint. See note 8 *supra*.

between the effectively organized railroads and the equally effective railroad unions * * *." *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 752-53 (1945) (dissenting opinion of Mr. Justice Frankfurter). The special situation in the railroad industry, where strong unions and management had become used to dealing with each other, differed vitally from the host of problems at which the Wagner Act was aimed—businesses of every size and description, many with a history of strong anti-union bias and with ample opportunity for strong-arm tactics. It was thus natural that the Wagner Act should stress administrative adjudication whereas the earlier Railway Labor Act relied primarily on mediation. For the courts to require the Mediation Board to transform itself into an adjudicative and prosecutorial agency like the N.L.R.B. or to impose themselves upon it would distort the entire Congressional scheme. Moreover, Congress evidently considered the railroad and, later, the air transport industry to be so heavily charged with public interest as to make speed in the disposition of disputed questions of representation peculiarly vital. The thirty day period which Congress gave the Mediation Board to investigate and certify under § 2 Ninth is to be contrasted with the 475 days reported a few years ago to be the average time lapse between the filing of a charge and final decision of the NLRB, Organization and Procedure of the National Labor Relations Board. Report to the Senate Committee on Labor and Public Welfare, S. Doc. No. 81, 86th Cong. 2d Sess. (1960), pp. 1-2, and with the nearly six months which were here required for full hearings, briefing and decision by an effective judge in the District Court. Considerations such as these, and others marshalled in the opinions in the *Switchmen's* and *M.K.T.* cases, underlay the Court's conclusion that, as to the Railway Labor Act, "The inference is thus strong that Congress intended to go

no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate." 320 U. S. at 333; see also 320 U. S. at 302. "There was to be no dragging out of the controversy into other tribunals of law." 320 U. S. at 305. Contrast *Leedom* v. *Kyne*, 358 U. S. 184 (1958).

Appellants argue that if the District Court had "jurisdiction" when the suit was filed in March, before Allied even existed, this could not have been lost because the Mediation Board concluded in May that there was a representation dispute between ALPA and Allied and that the latter was not disqualified. But it had become apparent, long before Allied's application to the Mediation Board, that this action was subject to the vice that it sought orders from a federal court that might frustrate ultimate determination by the agency to which Congress gave exclusive responsibility; the action should have been dismissed as soon as this appeared. See *Division 14, Order of Railroad Telegraphers* v. *Leighty*, 298 F. 2d 17 (4 Cir.), cert. denied, 369 U. S. 885 (1962). The obstacle in a case like this is not truly lack of "jurisdiction" in the basic sense of a lack of power in the court "to determine whether it [the claim] was or was not well founded in law and in fact," *Lauritzen* v. *Larsen*, 345 U. S. 571, 575 (1953); rather, as Mr. Justice Jackson there went on to explain, "As frequently happens, a contention that there is some barrier to granting plaintiff's claim is cast in terms of an exception to jurisdiction of subject matter." Compare *Bell* v. *Hood*, 327 U. S. 678 (1946). Whether such a "barrier" is apparent the very instant that suit is brought or becomes so later, the court is bound to dismiss.[11]

Affirmed.

11. In view of this conclusion, it is unnecessary to consider appellees' contentions that injunctive relief was barred by §§7 and 8 of the Norris-LaGuardia Act, 29 U. S. C. §§107, 108.

Norris-La Guardia Act, 47 Stat. 70, 29 U. S. C. §§101, 102, 104, 105, 107, 108, 109, 113

Section 101. Injunction prohibited except as herein provided.—No court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act [§101 et seq. of this title]; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act [§101 et seq. of this title]. (Mar. 23, 1932, c. 90, §1, 47 Stat. 70.)

Section 102. Public policy of United States.—In the interpretation of this Act [§101 et seq. of this title] and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other

mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted. (Mar. 23, 1932, c. 90, §2, 47 Stat. 70.)

Section 104. Grounds for injunction limited.—No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act [§103 of this title];

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act [§103 of this title]. (Mar. 23, 1932, c. 90, 4, 47 Stat. 70.)

Section 105. Combinations or conspiracies.—No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doings in concert of the acts enumerated in section 4 of this Act [§104 of this title]. (Mar. 23, 1932, c. 90, §5, 47 Stat. 71.)

Section 107. Hearing on sworn complaint—Testimony—Findings—Notice—Irreparable injury—Period of restraint—Undertaking.—No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: Provided, however, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a

hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity. (Mar. 23, 1932, c. 90, §7, 47 Stat. 71.)

Section 108. Person violating obligation not entitled to relief.—No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration. (Mar. 23, 1932, c. 90, §8, 47 Stat. 72.)

Section 109. Findings—Specific order.—No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein. (Mar. 23, 1932, c. 90, §9, 47 Stat. 72.)

Section 113. What constitutes labor dispute—Participants—Courts included.—When used in this Act, and for the purposes of this Act—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia. (Mar. 23, 1932, c. 90, §13, 47 Stat. 73.)

Railway Labor Act, 45 U. S. C. §152 Ninth, 44 Stat. 577, as Amended

Ninth. Disputes as to identity of representatives—Designation by Mediation Board—Secret elections. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Railway Labor Act, 45 U. S. C. §155, 44 Stat. 580, as Amended

155. Functions of Mediation Board.—First. Disputes within jurisdiction of Mediation Board. The parties, or either party, to a dispute between an employee or group of employees and a carrier may, invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act [§160 of this title]) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act [§160 of this title], no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Second. Interpretation of agreement. In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this Act, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

Third. Duties of Board with respect to arbitration of dispute—Arbitrators—Acknowledgment of agreement—Notice to arbitrators—Reconvening of arbitrators—Filing contracts with Board—Custody of records and documents. The Mediation Board shall have the following duties with respect to the arbitration of disputes under section 7 of this Act [§157 of this title]:

(a) On failure of the arbitrators named by the parties to agree on the remaining arbitrator or arbitrators within the time set by section 7 of this Act [§157 of this title], it shall be the duty of the Mediation Board to name such remaining arbitrator or arbitrators. It shall be the duty of the Board in naming such arbitrator or arbitrators to appoint only those whom the Board shall deem wholly disinterested in the controversy to be arbitrated and impartial and without bias as between the parties to such arbitration. Should, however, the Board name an arbitrator or arbitrators not so disinterested and impartial, then, upon proper investigation and presentation of the facts, the Board shall promptly remove such arbitrator.

If an arbitrator named by the Mediation Board, in accordance with the provisions of this Act, shall be removed by such Board as provided by this Act, or if such an arbi-

trator refuses or is unable to serve, it shall be the duty of the Mediation Board, promptly, to select another arbitrator, in the same manner as provided in this Act for an original appointment by the Mediation Board.

(b) Any member of the Mediation Board is authorized to take the acknowledgment of an agreement to arbitrate under this Act. When so acknowledged, or when acknowledged by the parties before a notary public or the clerk of a district court or a court of appeals of the United States, such agreement to arbitrate shall be delivered to a member of said Board or transmitted to said Board, to be filed in its office.

(c) When an agreement to arbitrate has been filed with the Mediation Board, or with one of its members, as provided by this section, and when the said Board has been furnished the names of the arbitrators chosen by the parties to the controversy it shall be the duty of the Board to cause a notice in writing to be served upon said arbitrators, notifying them of their appointment, requesting them to meet promptly to name the remaining arbitrator or arbitrators necessary to complete the Board of Arbitration, and advising them of the period within which, as provided by the agreement to arbitrate, they are empowered to name such arbitrator or arbitrators.

(d) Either party to an arbitration desiring the reconvening of a board of arbitration to pass upon any controversy arising over the meaning or application of an award may so notify the Mediation Board in writing, stating in such notice the question or questions to be submitted to such reconvened Board. The Mediation Board shall thereupon promptly communicate with the members of the Board of Arbitration, or a subcommittee of such Board appointed

for such purpose pursuant to a provision in the agreement to arbitrate, and arrange for the reconvening of said Board of Arbitration or subcommittee, and shall notify the respective parties to the controversy of the time and place at which the Board, or the subcommittee, will meet for hearings upon the matters in controversy to be submitted to it. No evidence other than that contained in the record filed with the original award shall be received or considered by such reconvened Board or subcommittee, except such evidence as may be necessary to illustrate the interpretations suggested by the parties. If any member of the original Board is unable or unwilling to serve on such reconvened Board or subcommittee thereof, another arbitrator shall be named in the same manner and with the same powers and duties as such original arbitrator.

(e) Within sixty days after the approval of this Act [June 21, 1934] every carrier shall file with the Mediation Board a copy of each contract with its employees in effect on the 1st day of April 1934, covering rates of pay, rules, and working conditions. If no contract with any craft or class of its employees has been entered into, the carrier shall file with the Mediation Board a statement of that fact including also a statement of the rates of pay, rules, and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules, or working conditions, or in those rates of pay, rules, and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective.

Railway Labor Act, 45 U. S. C. §155, 44 Stat. 580, as Amended

(f) The Mediation Board shall be the custodian of all papers and documents heretofore filed with or transferred to the Board of Mediation bearing upon the settlement, adjustment, or determination of disputes between carriers and their employees or upon mediation or arbitration proceedings held under or pursuant to the provisions of any Act of Congress in respect thereto; and the President is authorized to designate a custodian of the records and property of the Board of Mediation until the transfer and delivery of such records to the Mediation Board and to require the transfer and delivery to the Mediation Board of any and all such papers and documents filed with it or in its possession. (May 20, 1926, c. 347, Title I, §5, 44 Stat. 580; June 21, 1934, c. 691, §5, 48 Stat. 1195; June 25, 1948, c. 646, §32, 62 Stat. 991; May 24, 1949, c. 139, §127, 63 Stat. 107.)

Railway Labor Act, 45 U. S. C. §§181, 183, 49 Stat. 1189

181. Application of sections 151, 152, 154-163 to carriers by air.—All of the provisions of Title I of this Act [§§151-163 of this title], except the provisions of section 3 thereof [§153 of this title], are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service. (May 20, 1926, c. 347, Title II, §201, as added Apr. 10, 1936, c. 166, 49 Stat. 1189.)

183. Disputes within jurisdiction of Mediation Board.—The parties or either party to a dispute between an employee or a group of employees and a carrier or carriers by air may invoke the services of the National Mediation Board and the jurisdiction of said Mediation Board is extended to any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to an adjustment board, as hereinafter provided, and not adjusted in conference between the parties, or where conferences are refused.

The National Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

The services of the Mediation Board may be invoked in a case under this title [§§181-188 of this title] in the same manner and to the same extent as are the disputes covered by section 5 of Title I of this Act [§155 of this title]. (May 20, 1926, c. 347, Title II, §203, as added Apr. 10, 1936, c. 166, 49 Stat. 1189.)

Federal Rules of Civil Procedure

Rule 52(a)

Findings by the court—(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Rule 65(d)

(d) Form and scope of injunction or restraining order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

[redacted]

[redacted]

No. [redacted]

MICHOLAS J. O'CONNELL, Jr., *etc. et al.*,

Petitioners,

v.

JOSEPH V. MANNING, *etc. et al.*,

Respondents.

No. [redacted]

AMERICAN AIRLINES, INC.,

Petitioner,

v.

JOSEPH V. MANNING, *etc. et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[redacted]

[redacted]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 454

NICHOLAS J. O'CONNELL, JR., *etc., et al.*,

Petitioners,

v.

JOSEPH V. MANNING, *etc., et al.*,

Respondents.

No. 455

AMERICAN AIRLINES, INC.,

Petitioner,

v.

JOSEPH V. MANNING, *etc., et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents ("Engineers" or the "Chapter") hereby oppose the petitions of Nicholas J. O'Connell, Jr., *et al.*

("Pilots") in No. 454 and American Airlines, Inc. ("Company") in No. 455.*

Statement of the Case

A statement of the case sufficient for consideration of these petitions is incorporated in the points of the argument. For a comprehensive statement of this case and the ALPA case, which were tried together, the Court is respectfully referred to the opinion of the District Court (R. Vol. III, 1b, *ff.*).

Argument

1. This Court Denied Certiorari to Review the Affirmance in a Case Tried Together with This Case and Involving a Like Determination by the District Court.

In the District Court the Engineers were the intervenors in an action which plaintiff Air Line Pilots Association ("ALPA") brought to compel the Company to recognize it as the bargaining representative of the pilots in its employ. What precipitated the litigation was the refusal of the Pilots, then constituting the ALPA negotiating committee, to comply with the "crew complement" policy of the International in the negotiations under way with the Company. Over ALPA's objections, the Company continued to bargain with the Pilots; as would appear only later, the Pilots were well on the way to establishing an independent union.

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* The Engineers, referred to in the Pilots' petition as the "FEIA," are the president of the American Airlines Chapter of the Flight Engineers' International Association and the Chapter itself; however, the International was party neither to the Chapter's agreement with the Company nor to any of the events underlying this dispute.

Since the "crew complement" negotiations had been tripartite and merger of the Chapter with ALPA had been contemplated, the Chapter intervened, seeking only a declaration of the rights of the parties. Thereafter, the Chapter was constrained to seek an injunction to compel the Company to recognize it as the bargaining representative of the flight engineers. For though no other organization represented or claimed to represent the flight engineers, the Company had become adamant in its position that the Chapter, having participated in tripartite "crew complement" negotiations, had thereby surrendered its representation rights with respect to wages and other working conditions of the flight engineers to a "joint committee" controlled by the Pilots. The Company resorted to this tactic because the Chapter, after the rift within ALPA, had resisted committing itself to merger with a pilot labor organization then unknown and unknowable, the legal propriety of which was the core of the ALPA complaint.

In the District Court, where ALPA's and the Chapter's refusal-to-bargain complaints were tried together, the Company's principal defense was that both cases involved a representation question within the exclusive jurisdiction of the National Mediation Board. In the Court of Appeals as well, that was the Company's principal contention in both cases.

The District Court found there was a substantial question as to the identity of the pilots' bargaining representative and denied ALPA's motion for a preliminary injunction; it dismissed ALPA's complaint for lack of jurisdiction and severed that case from the Chapter's (R. Vol. III, 52b;

57b). The Second Circuit affirmed, and this Court denied certiorari. *Ruby* v. *American Airlines, Inc.*, 227 F. Supp. 674 (S. D. N. Y.), *aff'd*, 323 F. 2d 248 (2d Cir. 1963), *cert. denied*, 376 U. S. 913 (1964).

At the same time the District Court found there was *no* representation question concerning the flight engineers and granted the Chapter's motion for a preliminary injunction (R. Vol. III, 55b). The Second Circuit has affirmed and denied the petitions for a rehearing, one judge dissenting; the petitions for rehearing *en banc* were also denied, without dissent (Jt. App. 44-47).

If there was no compelling reason to review the affirmance of the District Court's determination in the ALPA case, there would appear to be no compelling reason to review the affirmance in this case of a like determination by the same District Court rendered in the same opinion after the same trial.

2. The Company's Lofty Protestations Notwithstanding, This Case Turns Entirely on Its Own Facts and Should Not Be Reviewed by This Court.

The first reason the Company advances for granting certiorari is more formal than substantial. The Company asserts that "the proper functioning of appellate review in the federal courts" is at issue (Pet. 12), but what the reason comes to is that the majority in the Court of Appeals improperly characterized the following statement from the 55-page opinion of the District Court as a finding of fact rather than a conclusion of law:

> From at least as early as January 31, 1963 to July 11, 1963, the Company refused to bargain collectively with the Chapter, and until at least as late

> as March 15, 1963 the Company instead bargained collectively in respect of flight engineers only with a committee, of which O'Connell was Chairman, and which the Company claimed represented the flight engineers. (Jt. App. 3)

The statement quoted cannot be a finding of fact, the Company contends, because (a) it was not "separately stated" to be such, in violation of Fed. R. Civ. P. 52(a), thereby throwing the Court of Appeals into confusion, and because (b) the Company's refusal to bargain took some form other than a refusal to meet, thereby precluding any other such fact-finding!

However, Fed. R. Civ. P. 52(a) expressly permits, "if an opinion or memorandum of decision is filed," that findings and conclusions "appear therein"; and it is well-settled that wherever in the opinion a finding (or conclusion) appears or however it is labeled, the Rule is reasonably complied with if the opinion affords an adequate understanding of the basis of decision.*

Furthermore, it is quite clear that the majority viewed the quoted statement as they would any "traditional conclusory statements of fact based upon a distillation of the proofs and the making of essential inferences of fact" (Jt. App. 5). To the majority it was clearly the "critical find-

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* *Elam* v. *United States*, 250 F. 2d 582, 583 (6th Cir.), *cert. denied*, 358 U. S. 848 (1958); *Stone* v. *Farnell*, 239 F. 2d 750, 755 (9th Cir. 1957); *Food Fair Stores, Inc.* v. *Square Deal Mkt. Co.*, 206 F. 2d 482, 484 (D. C. Cir. 1953), *cert. denied*, 346 U. S. 937 (1954); *Central Ry. Signal Co.* v. *Longden*, 194 F. 2d 310, 320 (7th Cir. 1952); *Benrose Fabrics Corp.* v. *Rosenstein*, 183 F. 2d 355, 357 (7th Cir. 1950); *Burnham Chemical Co.* v. *Borax Consolidated, Ltd.*, 170 F. 2d 569, 574 (9th Cir. 1948), *cert. denied*, 336 U. S. 924 (1949).

ing," but hardly the only finding (Jt. App. 3). The majority next proceeded

> . . . . to a chronological statement of the course of events supplemented by comments and discussion, all for the purpose of demonstrating that the finding quoted above is supported by substantial evidence. In the process we think it will clearly appear that the proofs overwhelmingly support the finding . . . (Jt. App. 5)

It was immaterial to the majority, as it was to the District Court, *and* as it was to the Engineers, whether the Company bargained with the Engineers "across one table" jointly with the Pilots or "across two tables" (Pet. 2-3). The crucial question, rather, was whether the Company discharged its duty effectively to recognize the Chapter as the bargaining representative of the flight engineers with respect to flight engineer wages and working conditions, whatever form the bargaining took. The inescapable answer was that the Company had not. The Company refused even to talk to the Engineers directly at the "joint" meetings (Jt. App. 13) and refused even to meet with them separately other than in "bull sessions" at which it would not "talk wages" (Jt. App. 14). Such conduct frustrated, rather than facilitated, the recommendations of the Feinsinger Commission that there be a "voluntary merger on fair and honorable terms," affording the flight engineers "a full measure of legally enforceable security" (R. Vol. IV, 2d, 3d). That was and remains the Engineers' position.

As for the Company's principal defense—that the Chapter had definitively relinquished its representation rights to the Pilot-controlled "joint committee"—the District Court

stated, "The difficulty is that the facts do not support such contention" (R. Vol. III, 53b). In the Court of Appeals, both the majority and the dissenting judge agreed that the position was "insupportable" (Jt. App. 16). The dissenting judge stated even that "this claim was specious and its making ill-advised"; yet he treated it as no more than an annoying argument of counsel (Jt. App. 26 n. 2)! However, as detailed in the majority opinion (Jt. App. 12-14), the Company took that position not only in this litigation, but in the negotiations, in which Company counsel, an employee of the Company, participated actively (Jt. App. 14).

Moreover, as the District Court further found, the Company not only refused to bargain with the Engineers, but, even after proceedings had commenced in court, "instead bargained" with the Pilots "in respect of flight engineers," concluding "an overall agreement" which covered "both pilots and engineers" (R. Vol. III, 40b-41b, 53b).

It is also quite clear that the majority gave "due regard . . . to the opportunity of the trial court to judge of the credibility of the witneses," within the letter, and spirit, of Fed. R. Civ. P. 52(a)—a prescription especially compelling in this case, which took weeks to try and produced over 3,000 pages of transcript and approximately 250 exhibits (Jt. App. 3, 5, 11, 15, 16).

In view of the majority's discussion of the facts and of the law, can it be reasonably supposed that the disagreement within the Court of Appeals was attributable, as the Company contends, to the District Court's failure to label the statement in issue? Can it be reasonably supposed that,

whatever the label, the majority would have held otherwise on this record?

Far from raising an important question of federal law which this Court should settle, the Company's petition seeks review of a decision which turns entirely on its own facts.

3. In Enforcing the Company's Duty to Bargain under the Railway Labor Act, the Courts Below Applied Well-Settled Law.

The next reason the Company advances for granting the writ is that the National Mediation Board, not the District Court, has "exclusive or primary" jurisdiction to determine whether or not the Company bargained properly, since it was bargaining "under the Board's auspices" (Pet. 3). The Company adds that but for the Chapter's resort to litigation, bargaining would have flourished, whereas "in the heat of litigation, bargaining soon withered" (Pet. 14).

The argument is utterly spurious. It flies in the face of the facts. The Company had taken its "joint committee" stand at least as early as January 31, 1963; persisted in that position throughout February 1963, declining to deal directly with the Engineers at the "joint meetings"; and refused to meet with the Engineers separately in March 1963 except in "bull sessions" where it would not "talk wages" even after the exchange of Section 6 notices (Jt. App. 11-14).

Even assuming, as the dissenting judge did (Jt. App. 33), that the Chapter had misconceived the Company's conduct and had been rash in running to court, its rashness was hardly irreversible. The Company could have commenced bargaining with the Engineers, or the Company

could have ceased bargaining with the Pilots. Instead, on March 15, 1963, *before* the Engineers petitioned for an injunction, the Company confirmed the Engineers' fears and compounded its refusal to bargain by concluding with the *Pilots* a collective bargaining agreement covering the *flight engineers* "as to compensation and everything else" (R. Vol. III, 41b). "The heat of litigation" only kindled *that* bargaining. "The cry 'they sued us' has a hollow ring" (Jt. App. 19). Rather, this was "a power play from first to last" (Jt. App. 20).

Moreover, the Company and the Engineers were *not* in mediation. It was the Pilots, not the Engineers, who had reached an impasse in negotiating the terms of their basic agreement and had been in mediation (R. Vol. III, 10b, 14b). It was not until February 28, 1963, that the Engineers and the Company exchanged Section 6 notices affecting their basic agreement (R. Vol. III, 39b). So far as concerned the Engineers, the NMB's function had been confined to resolving the "crew complement" issue (R. Vol. III, 19b). The District Court was not dazzled by this NMB backdrop.

It is a fundamental feature of the Railway Labor Act that invocation of the NMB is the second step, not the first, in the settlement of a "major" dispute—that the primary duty of the parties is to bargain. *Elgin, J. & E. Ry.* v. *Burley*, 325 U. S. 711, 724-725 (1945). "It was that specific command for the disobedience of which this Court held in the *Virginian Ry. Co.* case (300 U. S. 515) that courts would provide a remedy." *General Committee* v. *Missouri-K.-T. R. R.*, 320 U. S. 323, 331 (1943).

This was neither a jurisdictional dispute, as in the M-K-T case, nor a representation dispute, as in the ALPA case.* The Courts below did no more, and no less, than apply settled law under the Railway Labor Act.

4. The Norris-La Guardia Act Is Inapplicable; Moreover, Petitioners' Arguments Based upon That Act Are Obviated by the Findings of Fact.

Both petitioners advance reasons for granting the writ based upon the Norris-La Guardia Act.

It is answer enough to the Company's argument that the Norris-La Guardia Act is inapplicable. *Virginian Ry.* v. *System Federation No. 40*, 300 U. S. 515 (1937). In the words of the District Court, that conclusion follows from "the facts as found," which are "exactly the same as in the *Virginian Ry.* case" (R. Vol. III, 52b, 53b): the carrier refused to recognize the bargaining representative certified by the NMB; instead, the carrier attempted to negotiate a collective bargaining agreement with another organization; the carrier was enjoined, in a "major" dispute, from negotiating such an agreement with any organization other

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* The Chapter, unlike ALPA, was certified by the NMB and, unlike ALPA, was and is not challenged by a rival representative (R. Vol. III, 52b-53b). The Company's "pending" petition to the NMB was filed May 16, 1963 (not "1964"; Pet. 7) for leave to intervene in the matter of the application of the Pilots' new union, Allied Pilots Association, for a certificate covering only pilots and co-pilots (R. Vol. III, 60b-70b). Allied has long been certified, but the Company's petition has not yet been granted. That petition, which favors the determination of a single craft or class including pilots, co-pilots and flight engineers, flouts the Feinsinger Commission recommendations (R. Vol. IV, 3d), which the Company publicly accepted (R. Vol. III, 10b; Vol. IV, 10d). Contrary to the statement in the Pilots' petition (Pet. 13), the Engineers did *not* intervene.

than the certified representative. For more than a quarter-century, *Virginian Ry.* has been consistently cited for the proposition that the duty to bargain and other duties under the Railway Labor Act are "binding and their breach redressable in the federal courts." *International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U. S. 682, 690 (1963).

An equally dispositive answer is the District Court's alternative holding—that "in any event and on this record" the Engineers in fact satisfied the requirements of Sections 7 and 8 of the Norris-LaGuardia Act (29 U. S. C. §§107, 108) (R. Vol. III, 54b-55b).

Likewise, the short answer to the Pilots' argument is that its underlying assumption—that the Pilots were not found guilty of any wrongdoing—is refuted by the District Court's findings. The argument is based largely on the fact that the Pilots never purported to represent the flight engineers (Pet. 7). But that fact only underscores their wrongdoing, for the District Court found (1) that "despite the withdrawal of the engineers from the joint sessions," the Pilots "continued their negotiations" with the Company "for an overall agreement," reaching and reducing to writing a "basic working agreement" which "covered both pilots and engineers, as to compensation and everything else" and "was designed to be executed by one bargaining representative for all 'pilots', including engineers," and (2) that neither this agreement nor a Company letter to the Pilots' chairman confirming the "rates of pay and retirement benefits for engineers" already negotiated and offering to negotiate "retroactive pay for engineers" with the "Joint Committee," was ever shown to the Engineers

(R. Vol. III, 40b-41b, 42b). Thus the Pilots, neither representing nor claiming to represent the flight engineers, knowingly enabled the Company to consummate its refusal to bargain, in violation of the "affirmative duty to treat only with the true representative, and . . . the negative duty to treat with no other." *Virginian Ry.* v. *System Federation No. 40, supra* at 300 U. S. 548.

It was the negotiation of that agreement, which came to light only during the trial, that led to the addition of the Pilots as parties defendant *and* to the issuance of a temporary restraining order against their signing that agreement or publicizing it at pilot council meetings to which flight engineers had been invited (R. Vol. IV, 1d). For there was uncontroverted testimony, by the Company and by the Pilots' chairman, that the Company delivered over 100 copies of that agreement to the Pilots, whom the Company knew would call and hold council meetings so as to acquaint not only the pilots with it, but also the flight engineers.*

It was thus appropriate to restrain and enjoin the Pilots, once they were made parties, as active participants in the wrongdoing, the "power play," whatever their motives. And it is apparent that the District Court's order realistically reflects the circumstances of this case and reasonably restrains only the specific conduct in which the Pilots engaged. "Nothing in this order is intended to limit any rights which any party may have under the Railway Labor Act" (Jt. App. 52).

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* This testimony appears at pages 349-350, 382-384 and 2830-2831 of the trial transcript, which is part of the record on appeal in the Second Circuit. 2d Cir. R. 11 (a).

Conclusion

For the foregoing reasons, the petitions should be denied.

Dated: New York, New York,
October 1, 1964.

Respectfully submitted,

ASHER W. SCHWARTZ,
Attorney for Respondents.

WALTER N. KAUFMAN,
Of Counsel.

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Supreme Court of the United States

October Term, 1964

No. 454

NICHOLAS J. O'CONNELL, JR., individually and as Chairman of the Master Executive Council of the pilots in the service of AMERICAN AIRLINES, INC., and the Negotiating Committee of said pilots, consisting of RICHARD LYONS, ROBERT T. GUBA, JOSEPH GARVEY, PAUL ATKINS and NICHOLAS J. O'CONNELL, JR., ex officio,

Petitioners,

against

JOSEPH V. MANNING, as President of the AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, and AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, an unincorporated association,

Respondents.

REPLY BRIEF FOR PETITIONERS

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Respondents.

REPLY BRIEF FOR PETITIONERS

This reply is submitted on behalf of petitioners Nicholas J. O'Connell, Jr., *et al.* (representing the American Airlines pilot group) in response to the brief of the respondents in the above-captioned proceeding.

For the following reasons, we believe that the respondents' brief confirms the necessity of granting the petition.

1. Respondents concede (brief, pp. 10, 11, 12), as we contended in our petition, that the pilot group did not claim

to represent the flight engineers. Yet, the first ordering paragraph of the District Court's order (Jt. App. 51) enjoins precisely this conduct.

2. The District Court did not, as respondents state (brief, p. 11), find "the requirements of Sections 7 and 8 of the Norris-LaGuardia Act" satisfied, and we invite the Court's attention to the pages cited by the respondents, Record Volume III, 54b-55b. *At best* the District Court found that the flight engineers fulfilled the "settlement" requirements under Section 8 but certainly made *none* of the findings required by Section 7.

3. In the absence of any findings of wrongdoing by the lower courts, respondents rely on passing references to the course of negotiations after the flight engineers left the Joint Committee sessions. The facts are, even as they are shown by the respondents' brief, that the pilots continued bargaining on the basis of documents and concessions that had been won over the past months in concert with the flight engineers; these vitally affected pilots and the American pilot group was certainly not required to junk these gains when the flight engineers withdrew. The "agreements" of which the respondents complain insofar as they affected flight engineers were never signed or implemented, and there is no indication or finding that pilots intended to do so without the agreement of the flight engineer representatives. This had been the procedure with respect to the crew complement agreement of December 1, 1964 (R. 19b-20b). As the District Court points out, the agreement which the respondents discuss "was designed to be executed by Alpa, by the Chapter [respondents], and by the Company" (R. 41b).

Conclusion

By far, the largest portion of the respondents' brief replies to a separate petition (No. 455) by American Airlines. The pilots' petition and the Company's present different, serious and substantial questions. Certainly, respondents must have originally predicated their actions for injunctive relief against the carrier and the pilots' union on different grounds and different theories, for while the Railway Labor Act imposes certain duties of bargaining upon the carrier, it recognizes a *competition* of interest as between labor organizations. Yet, in order to sustain the decision against the pilots, the respondents have sought to confuse the responsibilities and duties of an employer with those of another union.

The respondents have not met with reason or authority a single point—including the vital Norris-LaGuardia jurisdictional question—raised by the pilots' petition. By involving the pilots in their litigious struggle with the Company, the respondents apparently seek to carve out, through an injunctive order, some future tactical advantage in the uncertain bargaining future that lies ahead of all unions in the airline industry. We can find no other reason for the flight engineers' persistent pursuit of judicial restrictions upon the pilots' union's freedom of action. We do not believe that the respondents have shown that the order of the District Court is rooted in past conduct or present necessity; it is supported by neither equity nor reason and flies directly in the face of the most plainly stated legislative requirements. Perhaps the most important consideration for this Court is the prospect that

such seriously misconceived decisions will breed increasing disorder in the application of the Norris-LaGuardia Act, the Railway Labor Act and the Federal Rules of Civil Procedure to the field of labor law litigation.

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be granted.

Respectfully submitted,

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October 8, 1964

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IN THE

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AMERICAN AIRLINES, INC.,

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JOSEPH V. MANNING, as President of the AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, and AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, an unincorporated association,

Respondents.

SUPPLEMENTAL JOINT APPENDIX

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Appendix A

Letter to A. P. A. and F. E. I. A.

Mr. Nicholas J. O'Connell
President
Allied Pilots Association
405 Lexington Avenue
New York, New York 10017

Mr. William A. Gill, Jr.
President
Flight Engineers' International Association
100 Indiana Avenue, N.W.
Washington, D. C. 20001

Gentlemen:

The following statement is made subject to and effective with the signing of a formal and final agreement by and between the Carrier and the two labor organizations mentioned below, respectively.

The terms and provisions of the Tripartite Agreement dated October 17, 1964, between the Allied Pilots Association, the Flight Engineers' International Association, AAL Chapter, and American Airlines, pertaining to the performance of the flight engineering function on American Airlines, were negotiated and subsequently agreed upon in mediation pursuant to Section 5, First, of the Railway Labor Act.

Those provisions of the said Tripartite Agreement relating to bargaining and the performance of the representation function terminated a long-standing dispute of substantial impact on the airline industry and the public in a manner considered equitable, reasonable, and in full consideration of the respective contentions of the respective parties.

Appendix A

The execution and implementation of the Tripartite Agreement is not meant to and shall not cause either labor organization to suffer an increased risk of loss of representation rights.

Sincerely yours,

W. Willard Wirtz
Secretary, U. S. Department of Labor

Date: March 8, 1965

Howard G. Gamser
Chairman, National Mediation Board

Date: March 10, 1965

Appendix B

Tripartite Agreement

1. Pursuant to the certification from the National Mediation Board, the Company and the Allied Pilots Association recognize the AAL Chapter, FEIA, AFL-CIO, as the duly designated exclusive bargaining representative of the third crew members listed on the American Airlines Flight Engineer System Seniority List set forth in Appendix A attached hereto who are assigned to and serve at the third crew member position on all aircraft operated by the Company with a minimum cockpit flight crew of three or more (hereinafter referred to as "Flight Engineers"). The Flight Engineers will be covered by the Basic Agreement between the Chapter and the Company.

2. The Company and the AAL Chapter, FEIA, AFL-CIO, recognize the Allied Pilots Association, as the duly designated exclusive bargaining representative of all third crew members who are assigned to and serve at the third crew member position on all aircraft operated by the Company with a minimum cockpit flight crew of three or more other than the third crew members referred to above as Flight Engineers. The Flight Officers will be covered by the Basic Agreement between the Allied Pilots Association and the Company.

3. All cockpit crew members hired by the Company on or after July 1, 1964, shall meet the Company's employment requirements for the hiring of Pilots, and shall be represented by the Allied Pilots Association and covered by the Basic Agreement between the Allied Pilots Association and the Company.

4. No party to this Agreement shall seek in any manner to remove from the Federal Aviation Regulations the

requirement that a Flight Engineer certificate be possessed by one cockpit flight crew member in turbojet or turboprop aircraft, nor add to the Federal Aviation Regulations any requirement that will jeopardize the job security of any Flight Engineer, but the parties reserve the right to express their individual views to the Federal Aviation Agency with respect to proposed rule-making aimed at substituting criteria other than gross weight as the basis for determining crew requirements for aircraft to be certificated in the future.

5. (a) Each Flight Engineer shall be deemed qualified for the third crew member position as long as he satisfies the minimum government requirements for such position. Should governmental regulations change to impose additional requirements for the third crew member position on any aircraft, the necessary additional training therefor will be provided, on Company time and at Company expense, for the Flight Engineer, if such position remains primarily a flight engineering function, as it is generally known. If a change in qualifications by any governmental agency causes or threatens to cause Flight Engineers to lose employment as third crew members, the consequences of such change to such Flight Engineers shall be equitably resolved in accordance with procedures set forth in Section 8 of this Agreement.

(b) Flight Engineers shall accept such additional training relating to the proper performance of the third crew member function as the Company may require, on Company time and at Company expense.

6. Each Flight Engineer shall have priority and seniority over all Pilots (including Flight Officers) for the third crew member position on any type of aircraft operated by the Company for which such Flight Engineer meets the minimum government requirements for the third crew member position pursuant to Section 5 above. No Flight Engineer shall be furloughed or continued on forlough while any Pilot (including Flight Officer) is serving as third crew member on any type of aircraft operated by the Company for which such Flight Engineer meets the minimum government requirements for the third crew member position. Flight Engineers shall be eligible for the rights herein provided until retirement, resignation, severance, or discharge for cause and, if furlough and recall of Flight Engineers should become necessary at any time after the execution of this Agreement, the rights herein shall survive such furlough and recall. If a Flight Engineer does not chose to exercise his seniority to assert such priority in any particular instance, he may not subsequently invoke this Section to assert priority as to the particular instance in which he did not exercise his seniority.

7. The agreement to guarantee Flight Engineers the prior rights as defined in Section 6 above shall be made directly with and on behalf of each individual Flight Engineer because of his past service with the Company, to be legally enforceable by him pursuant to the provisions of Section 8 hereof, and shall be in the form attached as Appendix B to the original executed copy hereof, and shall be given to each Flight Engineer.

8. Any dispute, claim or grievance arising out of or relating to the interpretation or application of this Agreement shall be resolved pursuant to Section 204 of the Railway Labor Act as follows:

(a) Any party to or person bound by this Agreement may serve a written notice of protest, within thirty days

after the date of becoming aware of the action protested, on each member of the Tripartite Board of Adjustment hereinafter established.

(b) The Tripartite Board of Adjustment shall consist of the President of the Allied Pilots Association, the President of the AAL Chapter, Flight Engineers International Association, and the Vice President-Flight of the Company. An alternate designated by any one of the foregoing Board members may serve in his stead. A unanimous decision by the three-member Board will be final and binding on all parties. If the decision is not unanimous, the matter may be appealed to the neutral referee as provided below.

(c) If the Tripartite Board of Adjustment fails to render a unanimous decision within thirty days after receipt of the protest, or a vacancy exists on the Board, the petitioner may cause the matter to be referred to Harry H. Platt, Esq., as neutral referee or, in the event of his inability to serve, Peter M. Kelliher, Esq., as his alternate, by serving a notice thereof on each of the Board members and the neutral referee within forty days after the protest was originally received by the Board. The decision of the neutral referee shall constitute the determination of the Tripartite Board of Adjustment. The other members of the Tripartite Board of Adjustment shall advise the neutral referee, and shall provide the neutral referee with information and assistance as required by him, but they shall not vote on the decision. The absence of one or more such Board members, other than the neutral referee, shall in no way affect the validity or enforceability of the decision of the neutral referee. If the neutral referee is unable to serve, his successor shall be chosen pursuant to the Voluntary Labor Arbitration Rules of the American Arbitration Association.

(d) The decision of the neutral referee shall be in writing and signed, and shall be deemed an arbitration award which is final and binding on the parties.

(e) The expenses of the proceedings, including the compensation of the neutral referee, shall be shared equally by each of the parties to this Agreement, and the proceedings shall be conducted pursuant to procedures established by the neutral referee.

(f) The Tripartite Board of Adjustment shall not have jurisdiction to interpret the working agreements of the parties. Any dispute arising under this Agreement which requires interpretation of the working agreements shall be promptly referred by the neutral referee to the appropriate System Board of Adjustment, and the System Board of Adjustment shall issue its interpretation within sixty days after the matter has been referred to it, or as soon thereafter as possible. Thereafter, on the basis of such interpretation by the System Board of Adjustment, the Tripartite Board of Adjustment shall take whatever, if any, further action may be necessary to give effect to the terms of this Tripartite Agreement.

(g) The procedures prescribed in this Section 8 shall be exclusive and any claims not processed in accordance with them shall be deemed to be waived.

9. (a) After each new Pilot Agreement is settled in the future, upon the same effective dates, changes in the rules and working conditions applicable to Flight Officers thereunder shall also become applicable to Flight Engineers, as appropriate, except that (i) Flight Engineer training will be governed exclusively by Section 5 of this Tripartite Agreement, (ii) Flight Engineers shall not acquire or accrue seniority as Pilots, (iii) Flight Engineers

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shall not be covered thereby in the American Airlines Pilot Retirement Benefit Plan but shall be covered in the American Airlines Retirement Benefit Plan for Flight Engineers effective January 1, 1965, and the American Airlines Supplemental Variable Annuity Plan effective January 1, 1965,* (iv) the allocation of Flight Engineer cockpit duties shall be determined by the Company, (v) there shall be a Flight Engineer grievance procedure and System Board of Adjustment, as set forth in Appendix C attached hereto and a part hereof and (vi) Appendix D attached hereto and a part hereof is a memorandum agreement between the AAL Chapter, FEIA, and the Allied Pilots Association with respect to payments for services rendered.

(b) The Flight Engineers shall not engage in any strikes, work stoppages, slowdowns, curtailment of work, or other concerted action, while this Agreement remains in effect, and any disputes, if not otherwise resolved, shall be submitted by either party to the Tripartite Board of Adjustment for a final and binding determination pursuant to Section 8 hereof.

10. Effective January 1, 1965, the rates of pay for Flight Engineers shall be based on 90 percent of present copilot pay. On and after January 1, 1966, the Flight Engineers will receive (i) the rates of pay for Flight Officers or (ii) rates of pay based on 90 percent of copilot pay, whichever is higher. Flight Engineer rate changes shall take place as of the same effective dates in each new future Pilot agreement covering rates of pay, except that the January 1, 1965 Flight Engineer rates shall remain unchanged through December 31, 1965.

* The AAL Chapter FEIA and the Company may make changes in retirement benefits applicable to Flight Engineers by mutual consent, but discussions of such changes shall not be deemed an exception to the waiver provisions of Section 12(a) of this Agreement.

Appendix B

11. The provisions of this Agreement shall prevail over inconsistent provisions in any other agreement and neither the Tripartite Board nor any Adjustment Board shall have jurisdiction to change the provisions of this Agreement. The terms of this Agreement shall be for the benefit of and binding upon the parties, their successors or assigns, and the individual Flight Engineers and Pilots now or in the future employed by the Company.

12. (a) This Agreement shall remain in effect so long as any Flight Engineer remains in the active employ of the Company as a flight crew member or retains recall rights. The parties hereto, as well as the persons bound hereby, irrevocably waive the right to serve any Section 6 notice, under the Railway Labor Act, of an intended change which, if adopted, would have the effect of modifying provisions contained in this Agreement or otherwise to require bargaining as to such provisions, provided, however, (i) that this Agreement may be changed by unanimous agreement among the parties and a majority of the Flight Engineers then performing services as such, and (ii) that Appendix C and Appendix D hereof may be changed by mutual agreement of the parties.

(b) This Agreement is a permanent resolution of a long-standing problem. Neither the Company, the Allied Pilots Association, the AAL Chapter, Flight Engineers International Association, AFL-CIO, their successors, assigns or affiliates, nor any individual Flight Engineer or Pilot (including Flight Officers), now or in the future employed by the Company, shall challenge, contest, or question the legality, validity, or enforceability of this Agreement, or any provision thereof, in any judicial, administrative, or other proceeding, and each of the parties shall participate in defending the legality, validity, and enforceability of

this Agreement in any judicial, administrative, or other proceeding involving any of its provisions.

IN WITNESS WHEREOF, the parties have set forth their signatures hereunto as of this 11th day of December, 1964.

For the AAL Chapter, Flight Engineers International Association, AFL-CIO.

/s/ Joseph D. Manning

For the Allied Pilots Association

/s/ Nicholas J. O'Connell, Jr.

For American Airlines, Inc.

/s/ A. Di Pasquale

Appendix A Annexed to Agreement

ORIGINAL CONTAINS LIST OF NAMES WHICH IS OMITTED HEREIN

Appendix B Annexed to Agreement

December 11, 1964

Dear Flight Engineer:

In consideration of your past services with American Airlines, and of your acceptance of the rights and obligations set forth in the Tripartite Agreement annexed hereto, the undersigned parties to that Agreement agree and represent to you that the terms and conditions thereof are binding upon them, their successors and assigns, are made with you and for your benefit as an individual Flight Engineer in the employ of American Airlines, and will remain in effect so long as you remain in the active employ of American Airlines as a Flight Crew Member or retain recall rights.

In the event that you have any dispute, claim or grievance arising out of or relating to the interpretation or application of the aforesaid Agreement, you are entitled to have such dispute, claim or grievance resolved by a written protest filed within thirty days after the date you became aware of the action protested. Your dispute, claim or grievance will be processed in accordance with the terms and conditions prescribed in Section 8 of the aforesaid Agreement.

The aforesaid Agreement is subject to change and the provisions thereof to modification only by the unanimous agreement of the undersigned parties and a majority of the Flight Engineers then in the active employ of the

Appendix B Annexed to Agreement

Company as a flight crew member or who retain recall rights.

Very truly yours,

AMERICAN AIRLINES, INC.

By:

ALLIED PILOTS ASSOCIATION

By:

AMERICAN AIRLINES CHAPTER,
FLIGHT ENGINEERS' INTERNATIONAL
ASSOCIATION, AFL-CIO

By:

Appendix C Annexed to Agreement

There is no difference between the parties with reference to the procedure and handling of flight engineer grievances below the System Board level. The parties agree to the following subsequent procedure applicable to flight engineer grievances:

(a) The flight engineers grievances in the categories hereinafter set forth shall be processed through the Flight Engineers System Board of Adjustment in the usual way:

(i) Grievances and cmf shr cmfw vbg c cmfwy ity of flight engineers among themselves insofar as such seniority may derive from the formulation of the flight engineers' seniority roster.

(ii) Grievances arising out of the change from 80% of scheduled time for bidding purposes to 100% of scheduled time.

(iii) Grievances arising out of the conversion of the flight engineers' sick leave hours to sick leave days.

(iv) Grievances arising out of the agency shop and dues and assessment check-off provisions in the Flight Engineers' agreement.

(v) Grievances arising out of Flight Engineers' Retirement Plan.

(vi) Grievances arising out of the retroactive pay provisions in the instant Flight Engineer agreement.

(vii) Grievances arising out of the longevity and accredited service credits of presently furloughed flight engineers.

(viii) Grievances arising out of disciplinary, discharge and dismissal disputes.

(ix) Pending grievances based on the flight engineer agreement in effect on December 10, 1964.

(b) All other flight engineer grievances at the system board level shall be processed as follows:

(i) The President of the Flight Engineers Chapter shall submit the grievance to the President of the Allied Pilots Association.

(ii) The President of the Allied Pilots Association shall within 30 days submit such grievance to the Pilots System Board of Adjustment.

(iii) In the event that the President of the Allied Pilots Association fails to so submit the grievance, the President of the Flight Engineers Chapter may submit the grievance to the Flight Engineers System Board of Adjustment.

(iv) Should the flight engineer's grievance be denied by a 4-man Pilot board, the grievant may file a complaint with the President of the Flight Engineers Chapter alleging discrimination by the Board against him as a Flight Engineer.

(v) Should the flight engineer's grievance be denied before a 5-man board with the neutral voting to deny the grievance, the decision of the 5-man board shall be final and binding and shall not be subject to any charge of discrimination.

(c) Should the flight engineer's grievance be denied by a 5-man Pilot board with the neutral voting to sustain the grievance and one or more of the pilot members re-

versing his previous vote on the 4-man board, then the flight engineer may file a complaint with the President of the Flight Engineers Chapter alleging discrimination against him as a flight engineer.

(d) No complaint of discrimination shall be considered unless (i) it is in writing signed by the grievant and (ii) it sets forth the basis of the alleged discrimination.

(e) Where such written complaint has been filed, the President of the Flight Engineers Chapter may in his discretion file such complaint with a 7-man System Board of Adjustment, which shall consist of two flight engineer representatives, two pilot representatives, two Company representatives, and a neutral.

(f) The 7-man board shall first consider the charge that the grievant was discriminated against because he was a flight engineer, and if this charge is sustained by a majority vote of the 7-man board, the same board shall then decide the grievance on its merits by majority vote. If the charge is not sustained the decision of the 5-man Pilot board shall be final and binding.

(g) The Company shall pay for the flight pay loss of Pilot and Flight Engineer members of the 7-man System Board, the cost of the neutral, and the cost of the transcript in such proceedings.

Appendix D Annexed to Agreement

The Flight Engineers Chapter recognizes its obligation to pay the Allied Pilots Association for services rendered. The Allied Pilots Association shall forward to the President of the Flight Engineers Chapter, not oftener than once a year, a statement of what it considers to be a reasonable charge for services rendered.

(a) The President of the Flight Engineers Chapter and the President of the Allied Pilots Association shall make a good faith effort to arrive at an amicable agreement on the amount to be paid by the flight engineers to the Allied Pilots Association.

(b) In the event that the respective Presidents fail to agree on the amount to be paid, the following issue will be submitted to an arbitrator:

"What amount of money shall be paid to the Allied Pilots Association by the FEIA for services rendered?"

(c) In determining the proper and just amount, the arbitrator shall take into consideration the membership of the APA and the FEIA, the cost of negotiations to the APA, the cost of administrative and related services performed by the APA during the term of an agreement, the positions and arguments of the parties with respect thereto, and such other factors as the arbitrator may consider to be relevant. The arbitrator shall also determine the effective date for the payment of the allocated amount issuing out of his award.

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IN THE

Supreme Court of the United States

October Term, 1964

No. 455

AMERICAN AIRLINES, INC.,

Petitioner,

v.

JOSEPH V. MANNING, as President of the American Airlines Chapter, Flight Engineers' International Association AFL-CIO, and AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, an unincorporated association,

Respondents.

MEMORANDUM OF PETITIONER SUGGESTING THAT THE CASE IS MOOT

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GEORGE A. SPATER
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IN THE

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AMERICAN AIRLINES, INC.,

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JOSEPH V. MANNING, as President of the American Airlines Chapter, Flight Engineers' International Association AFL-CIO, and AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, an unincorporated association,

Respondents.

MEMORANDUM OF PETITIONER SUGGESTING THAT THE CASE IS MOOT

This memorandum is filed to advise the Court of developments occurring after the granting of the petition for certiorari herein which, in petitioner's view, render this case moot.*

* A similar position is being taken also by petitioners in *O'Connell, etc., et al.* v. *Manning, etc., et al.*, No. 454, Oct. Term 1964, and a Supplemental Joint Appendix therefore is being filed in both cases concurrently. Attention is invited to the motion submitted by petitioners in the *O'Connell* case. We understand that the motion refers to factual matters which, for brevity, are not repeated herein.

On March 12, 1965, the parties entered into collective bargaining agreements disposing of all issues in dispute.* Of particular significance from the standpoint of this case is the "Tripartite Agreement" set forth in the Supplemental Joint Appendix, which contains detailed provisions prescribing the representation and bargaining relationships of the parties in the future. Also set forth in the Supplemental Joint Appendix is a letter signed by the Secretary of Labor and the Chairman of the National Mediation Board, which includes the following statement:

> "Those provisions of the said Tripartite Agreement relating to bargaining and the performance of the representation function terminated a long-standing dispute of substantial impact on the airline industry and the public in a manner considered equitable, reasonable, and in full consideration of the respective contentions of the respective parties."

It is not anticipated that respondents will take issue with the position that the litigation is moot. The incidents involved in the litigation occurred approximately two years ago, and the labor dispute has been resolved in its entirety by the settlement referred to above.** Thus, a case or controversy no longer exists.

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* The agreements are effective as of December 11, 1965.

** The questions set forth in the petition for certiorari are as follows (pp. 2-3):

> "1. '* * * whether the Railway Labor Act prohibits an employer who faces the demands of two employee groups that call for a joint solution from insisting that the negotiations be held simultaneously in one room and across one table, and requires him instead to negotiate across two tables in two separate rooms, running back and forth from one to the other.'*
>
> "2. Does the National Mediation Board have exclusive or primary jurisdiction over the question of whether an employer

In view of this situation, it is our understanding of *United States* v. *Munsingwear*, 340 U. S. 36 (1950), that application should be made to reverse or vacate the decision below and to remand with a direction to dismiss. The Court's opinion in the *Munsingwear* case contains the following statement (340 U. S. at 39-40):

> "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. That was said in Duke Power Co. v. Greenwood County, 299 U. S. 259, 267, to be 'the duty of the appellate court.' That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary." (Footnote omitted.)

See also *Brotherhood of Railroad Trainmen* v. *Chicago & Illinois R.*, 375 U. S. 18 (1963); *Publishers' Association of New York City* v. *New York Mailers' Union Number 6*, 376 U. S. 775 (1964).

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has bargained properly, when the bargaining is being conducted under the Board's auspices?'

"3. Are the requirements of the Norris-LaGuardia Act applicable in an injunction suit by a union against an employer covered by the Railway Labor Act?"

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* From the dissenting opinion in the instant case by Hon. Henry J. Friendly, U. S. C. J., 329 F. 2d at 23-24 (Jt. App. 25).

Conclusion

The judgment should be vacated and the case remanded to the United States District Court for the Southern District of New York for dismissal because of mootness.

Dated: New York, New York
April 2, 1965

Respectfully submitted,

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GEORGE A. SPATER
Of Counsel

Office-Supreme Court, U.S.
FILED
APR 3 1965
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Supreme Court of the United States

October Term, 1964

No. 454

NICHOLAS J. O'CONNELL, JR., individually and as Chairman of the Master Executive Council of the pilots in the service of AMERICAN AIRLINES, INC., and the Negotiating Committee of said pilots, consisting of RICHARD LYONS, ROBERT T. GUBA, JOSEPH GARVEY, PAUL ATKINS and NICHOLAS J. O'CONNELL, JR., ex officio,

Petitioners,

against

JOSEPH V. MANNING, as President of the AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, and AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, an unincorporated association,

Respondents.

MOTION FOR REVERSAL ON THE GROUNDS OF MOOTNESS

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Supreme Court of the United States

October Term, 1964

No. 454

NICHOLAS J. O'CONNELL, JR., individually and as Chairman of the Master Executive Council of the pilots in the service of AMERICAN AIRLINES, INC., and the Negotiating Committee of said pilots, consisting of RICHARD LYONS, ROBERT T. GUBA, JOSEPH GARVEY, PAUL ATKINS and NICHOLAS J. O'CONNELL, JR., ex officio,

Petitioners,

against

JOSEPH V. MANNING, as President of the AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, and AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, an unincorporated association,

Respondents.

MOTION FOR REVERSAL ON THE GROUNDS OF MOOTNESS

Motion is hereby made, in accordance with the rules of this Court, for an order reversing or vacating the decision of the courts below on the grounds of mootness and remanding the case with a direction to dismiss the orders heretofore entered.

Developments Since the Petition for Certiorari

As the Court knows, this case, as well as the related case of *American Airlines, Inc.* v. *Manning*, Dkt. No. 455, both arise from long-standing disputes as to the crew complement composition of airline cockpits. More particularly, they have arisen from the various contentions by pilots, flight engineers, their representatives, and the carrier, as to the qualifications necessary for the man serving in the "third seat" in the airliner cockpit. Incidental to that determination, there has also been the question of the identity of the union bargaining representative for such crew member.

The instant case arose out of a complaint by the respondent that the petitioner/defendant was improperly bargaining or attempting to bargain for the American Airline flight engineer group and otherwise improperly interfering with those employees' choice of their bargaining representative. This complaint resulted in the entry of a preliminary injunction against the American Airline pilot group (now represented by the Allied Pilots Association and hereinafter referred to as "Allied"), which prohibited them from what we consider many of the legitimate activities granted by federal law to labor organizations. This decision was affirmed by a divided court in the second circuit and a petition for review in this Court was subsequently filed and granted. Since the submission of our petition and subsequent to its grant, all of the parties have been actively involved in the collective bargaining process in order to achieve a negotiated and final resolution of their

differences. The culmination of these efforts took place on March 12, 1965 when all three parties signed a so-called Tripartite Agreement to be effective as of December 11, 1964. The full text of the Tripartite Agreement is being made available to the Court with this motion.* However, for the Court's convenience, we will refer specifically to a few aspects of that Agreement which demonstrate the mootness of the instant proceeding.

The Tripartite Agreement, in effect, guarantees the rights of present flight engineers to occupy the "third seat" in the cockpit and to enjoy continued representation by the AAL Chapter FEIA. However, the agreement also provides (¶3) that "All cockpit crew members hired by the Company on or after July 1, 1964, shall meet the Company's employment requirements for the hiring of pilots, and shall be represented by the Allied Pilots Association * * *" and covered by the pilot collective bargaining agreement. With certain limited exceptions (¶9), the Agreement also provides that flight engineers will in the future be automatically entitled to the changes in rules and working conditions negotiated in the pilots' collective bargaining agreements. In recognition of the bargaining services rendered to the flight engineers and the FEIA Chapter, Appendix D of the Agreement provides for monetary payment by the Chapter for such services.

Subject to the provisions already commented upon for the diminishing scope of the flight engineer bargaining unit,

* Since the Tripartite Agreement is relevant to the motions being made both by these petitioners and by American Airlines, it has been printed as a Supplemental Joint Appendix to both motions in order to minimize the cost of printing to the parties.

the Agreement in ¶1 and ¶2 contractually recognizes the bargaining rights of the two unions. Paragraph 8 of the Agreement establishes, pursuant to Section 204 of the Railway Labor Act, a Tripartite Board of Adjustment with reference, if necessary, to a neutral referee for the settlement of "any dispute, claim or grievance arising out of or relating to the interpretation or application" of the Agreement; such disputes would include any question arising under Paragraphs 1 and 2 or any other provision dealing with the representation rights of the two unions.

Paragraph 12(b) of the Agreement contains a broad provision declaring that the Agreement is a permanent resolution of the parties' differences, and committing the signatories to refrain from initiating any proceeding to question the Agreement and requiring them to participate in the defense of any proceeding that could conceivably be brought by a third party.

It has been the understanding of the parties throughout their negotiations on the Tripartite Agreement that a successful resolution of their differences would necessarily require the termination of all litigation arising out of those controversies. A preliminary agreement stating that "all pending court proceedings between the parties would be discontinued without costs" was initialed on October 17, 1964. Counsel for the various parties have endeavored to implement the objectives of the parties by agreement upon some form of stipulation. There is no need to involve the Court in the pros and cons of the various formulations advanced on a "no prejudice" basis; suffice it to say, the parties have not found it possible to agree on a single satisfactory form. In the absence of some such agreement,

we felt it our obligation, as petitioners, to advise the Court of these developments which have rendered moot the controversy between the parties concerning representation rights. Consequently, in accordance with the Rules and previous decisions of this Court, we have made the instant motion.

POINT I

Under the doctrine of *U. S.* v. *Munsingwear*, the instant procedure is the correct means of disposition.

This Court has, in the past, commented upon the correct procedure for disposing of a case which has become moot while pending decision. In *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39 (1950), this Court said:

> "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." [Citations in footnote omitted.]

In the *Munsingwear* case, which arose under the antitrust laws, there was an earlier decision dismissing an action for an injunction; that decision had been left standing. As the Court explained [340 U. S. at 40]:

> "In this case the United States made no motion to vacate the judgment. It acquiesced in the dismissal. It did not avail itself of the remedy it had to preserve its rights. Denial of a motion to vacate could bring the case here. Our supervisory power over the judgments of the lower federal courts is a broad one. See

28 U. S. C. §2106, 28 U. S. C. A. §2106, 62 Stat. 963; United States v. Hamburg-Amerikanische Packet-Fahrt-Actien Gesellschaft, 239 U. S. 466, 478, 36 S. Ct. 212, 217, 60 L. Ed. 387; Walling v. James V. Reuter, Inc., 321 U. S. 671, 676-677, 64 S. Ct. 826, 828, 829, 88 L. Ed. 1001. As already indicated, it is commonly utilized in precisely this situation to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences. The case is therefore one where the United States, having slept on its rights, now asks us to do what by orderly procedure it could have done for itself. The case illustrates not the hardship of *res judicata* but the need for it in providing terminal points for litigation."

Thus, this Court held that the Government was bound in a treble damages suit arising out of the same circumstances by the *res judicata* effect of the earlier dismissal of the action for an injunction. In commenting upon the procedure we are now adopting and which the Government in the *Munsingwear* case *should have* followed, this Court commented [340 U. S. at 40]:

> "When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary."

Similarly, the instant case is one involving only a preliminary injunction which by definition is a tentative and interim determination which should not be left standing to plague the future relations of the parties.

We emphatically believe that the issues we have presented to this Court on our petition for certiorari are important ones affecting the administration of justice in the Federal courts and, in particular, the application of the Norris-LaGuardia Act to labor organizations. We maintain the view that the implications of the decisions below

go far beyond the interests of the parties in the instant matter. Moreover, we are quite troubled by the fact that the issues arising from the injunction against the pilot organization were never adequately treated in any of the opinions by the lower courts. We believe those decisions were wrong, and it is with great reluctance that we contemplate the fact that they will not be resolved at an early date by this Court. However, in view of the Tripartite Agreement reached by the parties, which has been presented to this Court, we must in candor advise the Court that the dispute concerning the representation of the cockpit crew employees of American Airlines has become moot. Both from the point of view of the petitioners herein (who must avoid the pitfalls explained in the *Munsingwear* case) and in the interest of diminishing the effect of a doubtful precedent in the dynamic area of labor relations and labor law, we respectfully submit that the Court should reverse or vacate the judgment below and remand with a direction to dismiss, without costs to either party.

Conclusion

For the foregoing reasons, it is respectfully submitted that the petitioners' motion be granted, without costs to either party.

April, 1965

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 454

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Respondents.

No. 455

AMERICAN AIRLINES, INC.,
Petitioner,
v.
JOSEPH V. MANNING, *etc., et al.*,
Respondents.

MEMORANDUM AND APPENDIX IN OPPOSITION TO MOTIONS BASED UPON MOOTNESS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 454

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No. 455

AMERICAN AIRLINES, INC.,

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JOSEPH V. MANNING, *etc., et al.*,

Respondents.

MEMORANDUM IN OPPOSITION TO MOTIONS BASED UPON MOOTNESS

This memorandum "in opposition" is not intended to oppose the dismissal of these proceedings for mootness, but only to oppose dismissal in the manner requested by petitioners.

The suggested mootness has not come about through an extraneous event or the unilateral action of any of the parties, but solely by reason of a settlement entered into by all of the parties.* In moving to dismiss, petitioners rely upon that settlement, but have not fairly apprised the Court of the settlement provisions directly affecting the dismissal of pending litigation. In this memorandum, respondents would adequately acquaint the Court with those provisions and respectfully request the Court to dismiss these proceedings for mootness in the light of that settlement.

On October 17, 1964, petitioner American ("Company") and respondents ("Engineers") reached and initialed a "tentative agreement" resolving their long-standing labor dispute (App. 1a**). That agreement incorporated a "tripartite agreement," which petitioners cite in support of the suggestion of mootness (Supp. Jt. App. 2, *ff.*). On October 17th the "tripartite agreement" had yet to be signed by the third party, petitioners O'Connell *et al.* ("Pilots"); hence, the "tentative" over-all agreement between the Company and the Engineers.

Nonetheless, the Company announced to the public on October 18th that it had settled with the Engineers; and the letter signed on March 8, and 10, 1965, by the Secretary

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* In the District Court, petitioners unsuccessfully suggested mootness based upon their unilateral "declarations" and "assurances" to respondents. The District Court rejected the suggestion, largely on the authority of *United States* v. *W. T. Grant Co.*, 345 U. S. 629 (1953). (227 F. Supp. 697-698)

** "App." references are to the Appendix annexed hereto. "Supp. Jt. App." references are to the Supplemental Joint Appendix submitted in support of petitioners' motions.

of Labor and the Chairman of the National Mediation Board, cited to the Court by petitioners, refers to the "terms and provisions of the Tripartite Agreement dated October 17, 1964" (Supp. Jt. App. 1-2).

Part and parcel of the October 17th agreement was the further provision: "All pending court proceedings between the parties to be discontinued without costs." The "pending court proceedings" are (1) the proceedings in this Court to review affirmance of the District Court's issuance of a preliminary injunction against the Company and Pilots in the "bargaining case," (2) the Engineers' petition in the District Court for a permanent injunction in this "bargaining case," and (3) the Engineers' petition in the District Court for a permanent injunction in a companion case, the "dues check-off case."*

In the Pilots' motion, the provision of the October 17th agreement for discontinuance of pending court proceedings is characterized as merely "preliminary" (p. 4), but on October 17th that aspect of the settlement was no more preliminary or tentative than the "tripartite agreement."

On December 11, 1964, the Company, the Engineers *and* the Pilots reached agreement, expressly affirming certain prior agreements, including the "Memorandum of Tentative Agreement between American and the FEIA as initialed by Asher W. Schwartz and A. DiPasquale on October

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* Earlier this term, this Court denied review of the affirmance of the District Court's issuance of a preliminary injunction against the Company in the "dues check-off case." *Manning* v. *American Airlines, Inc.*, 221 F. Supp. 301 (S. D. N. Y. 1963), *aff'd*, 329 F. 2d 32 (2d Cir.), *cert. denied*, 379 U. S. 817 (1964). In the "dues check-off case," a temporary restraining order against the Engineers, extended by stipulation, is also outstanding.

17, 1964, which memorandum includes as its Exhibit B a Tripartite Agreement" (App. 2a).

The December 11th agreement, by its terms, became "effective immediately," subject to termination if it failed of ratification by the Pilot and Engineer groups. On December 15th, the Pilots' counsel requested of the Chief Deputy Clerk of this Court that further action in printing the record be deferred pending probable ratification of the agreement, since "one of the provisions of this agreement requires the termination of all litigation among the parties" (App. 4a). The agreement was ratified in due course, and counsel for the Company so notified the Chief Deputy Clerk, stating that "subject to completion of some necessary paper work, it is anticipated that a stipulation for dismissal pursuant to Rule 60 will be submitted in about six weeks" (App. 5a). The paper work was completed March 12, 1965.

Counsel for the parties, however, have been unable to agree on the terms of a stipulation for dismissal, to be filed in each of the pending cases. Counsel for the Company has insisted upon a speaking stipulation (App. 6a-7a), which was acceptable to counsel for the Pilots. Although the Engineers' counsel had assumed that a stipulation in the customary form would be filed (App. 9a), he was willing to sign Company counsel's stipulation except for paragraph 2, which provides in part that "no aspect" of any of the pending cases, "or any determinations therein, shall be regarded as evidence that the parties, or any of them, have violated any requirements of law." Suggested revisions of paragraph 2 by counsel for the Engineers and for the Pilots have not proved mutually acceptable (App. 8a).

Both the Company's and Pilots'. counsel have refused to sign the alternative stipulation, in the customary form, submitted by the Engineers' counsel (App. 9a).

It is altogether apparent that the stipulations proposed by the Company's and Pilots' counsel, especially paragraph 2 thereof, go beyond the agreement of the parties to "discontinue" court proceedings. However, all counsel agree that in the "bargaining case"—the only case before this Court—"all outstanding orders . . . be vacated and all appeals and pending requests for relief . . . be dismissed, with prejudice and without costs to any party," as stated in paragraph 1 (a) of Company counsel's proposed stipulation (App. 6a). This Court will effectuate that agreement, as well as the settlement agreement, if it dismisses these proceedings and remits the case to the District Court with instructions to dismiss on the ground of mootness.

No litigation is pending in the Court of Appeals to be "discontinued"; and there is no "outstanding order" of the Court of Appeals to be "vacated." There is only a judgment affirming the District Court, without any directions whatever. That judgment has not become unreviewable by this Court through "happenstance," as had occurred in *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 40 (1950), relied upon by petitioners. There, while an appeal was pending, the price regulation allegedly violated was rendered inapplicable by administrative action.

In any event, there is no occasion for this Court to *reverse* the judgment of the Court of Appeals, as the Pilots request, but not the Company. There is an obvious likelihood that such reversal would be taken as a vindication of

petitioners on the merits. Petitioners should not be permitted to accomplish by motion what their counsel were unable to accomplish by stipulation.

Apparently this Court has reversed in moot case where the judgment of the Court of Appeals was coupled with directions to the District Court, on the theory, expressed in *Brownlow* v. *Schwartz*, 261 U. S. 216, 218 (1923), that but for such reversal, such orders would be left "in force, —at least apparently so." However, does not vacating the judgment serve the same purpose? Furthermore, it would seem as inappropriate to reverse as it would to affirm, as this Court also observed in *Brownlow* v. *Schwartz*, *supra* at 217: "One would be as vain as the other."

In a case decided not long after *Brownlow* v. *Schwartz*, the judgment of the Court of Appeals was vacated, not reversed, on the ground of mootness, even though this Court there held, citing *Brownlow* v. *Schwartz*, that the Court of Appeals had *erred*—that the *Court of Appeals* "should have remanded the cause with directions to dismiss the petition as moot." *United States* ex rel. *Norwegian Nitrogen Products Co.* v. *United States Tariff Comm'n*, 274 U. S. 106, 112 (1927). As the citations concluding the Company's memorandum reflect (p. 3), the current practice of this Court in moot cases is to vacate rather than reverse judgments of the Courts of Appeals.

However, this Court has also dismissed moot cases without disposing of any of the proceedings below, as in *Schenley Distilling Corp.* v. *Anderson*, 333 U. S. 878 (1948) (mem.): "The parties being in agreement that the cause is moot, the motion to dismiss is granted and the appeal is

dismissed." See also *Pan American Airways Corp.* v. *W. R. Grace & Co.*, 332 U. S. 827 (1947) (mem.). Dismissal in that form would carry out the settlement of the parties in this case—to "discontinue" these proceedings. The agreement among the parties must surely outweigh the disagreement among their counsel.

Moreover, had counsel filed a stipulation for dismissal pursuant to Rule 60 of the Rules of this Court, as they contemplated (App. 5a), the judgment of the Court of Appeals would not have been vacated, let alone reversed. The concern expressed in the Pilots' motion lest the preliminary injunction of the District Court be "left standing to plague the future relations of the parties" (p. 6) is wholly unwarranted, for, as already noted, the parties are agreed that all outstanding orders are to be vacated.

This Court's "supervisory power over the judgments of the lower federal courts is a broad one." *United States* v. *Munsingwear, Inc., supra* at 340 U. S. 40. "If a judgment has become moot, this Court may not consider its merits, but may make such disposition of the whole case as justice may require." *Walling* v. *James V. Reuter, Inc.*, 321 U. S. 671, 677 (1944). In framing its orders in moot cases, this Court may consider "the nature and character of the conditions which have caused the case to become moot." *United States* v. *Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U. S. 466, 478 (1916); *Heitmuller* v. *Stokes*, 256 U. S. 359, 362 (1921).

For the foregoing reasons, respondents respectfully request that the Court, in dismissing these proceedings on the ground of mootness, do so consistently with the parties' settlement which has caused the mootness.

CONCLUSION

These proceedings should be dismissed without costs to any of the parties, and the case remanded to the United States District Court for the Southern District of New York for dismissal because of mootness.

Dated: New York, New York,
April 21, 1965.

Respectfully submitted,

ASHER W. SCHWARTZ,
Attorney for Respondents.

WALTER N. KAUFMAN,
Of Counsel.

APPENDIX

Memorandum of Tentative Agreement

/s/ AWS*
/s/ ADP**

October 17, 1964 New York, New York

MEMORANDUM OF TENTATIVE AGREEMENT

1. . . .

2. Tripartite Agreement as annexed (Ex. B) with following modifications:

. . .

8. All pending court proceedings between the parties to be discontinued without costs.

9. The Tripartite Agreement to be filed in U. S. District Court as part of record of settlement.

. . .

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* Asher W. Schwartz, Engineers' counsel.

** A. DiPasquale, Company's assistant vice president—labor relations.

Agreement of December 11, 1964

American Airlines, Inc. (American) and the American Airlines Chapter, Flight Engineers International Association (FEIA) and the pilots in the employ of American Airlines as represented by the Allied Pilots Association (Pilots) hereby agree:

1. The following prior agreements are hereby affirmed:

(a) The Memorandum of Tentative Agreement between American and the FEIA as initialed by Asher W. Schwartz and A. Di Pasquale on October 17, 1964, which memorandum includes as its Exhibit B a Tripartite Agreement.

. . .

2. [Same as "Appendix C annexed to Agreement" (Supp. Jt. App. 13-15)]

3. [Same as "Appendix D annexed to Agreement" (Supp. Jt. App. 16)]

. . .

6. This agreement becomes effective immediately, but if it fails to be ratified as set forth above, the agreement will thereupon terminate and be without any further force and effect.

Agreement of December 11, 1964

Signed at New York, New York, this 11th day of December, 1964.

/s/ Joseph V. Manning
For the AAL Chapter,
Flight Engineers
International Association

/s/ J. R. Lyons
For the Allied
Pilots Association
/s/ Ralph L. Harkenrider

/s/ J. O. Jarrard
For American Airlines, Inc.

Witnesses: [Omitted]

Letter from Pilots' Counsel to Chief Deputy Clerk

December 15, 1964

Hon. Edmund P. Cullinan
Chief Deputy Clerk
United States Supreme Court
Washington 25, D. C.

Dear Mr. Cullinan:

Mr. Wisehart's letter of December 14, 1964, accurately reflects the status of *O'Connell* v. *Manning*, No. 454, as well as No. 455, *American Airlines* v. *Manning*.

The Board of Directors of the pilot group will be meeting shortly to ratify an agreement among the various parties. Since, as Mr. Wisehart points out, one of the provisions of this agreement requires the termination of all litigation among the parties, I have been instructed to make every effort to limit any unnecessary Court costs. Therefore, while it is possible that the litigation may be continued, I would nonetheless respectfully request that you and the Court defer any further action in printing or preparing the record. I understand that it would be an imposition to make this request for more than a limited period of time, and we will inform you immediately of all further developments in this matter.

Sincerely,

MARTIN C. SEHAM

cc: ARTZ, Esq.
SHART, Esq.

Letter from Company's Counsel to Chief Deputy Clerk

January 6, 1965

Hon. Edmund P. Cullinan
Chief Deputy Clerk
United States Supreme Court
Washington 25, D. C.

Re: American Airlines, Inc. v. Manning, No. 455

Dear Mr. Cullinan:

Confirming our conversation today, this is to advise that the settlement between the parties in the above entitled matter has been ratified by the employees concerned. Therefore, subject to completion of some necessary paper work, it is anticipated that a stipulation for dismissal pursuant to Rule 60 will be submitted within about six weeks. This no doubt will also apply to No. 454, although we are not parties in that case.

Sincerely,

ARTHUR M. WISEHART
Attorney for American Airlines, Inc.

cc: ALEXANDER W. SCHWARTZ, ESQ.
MARTIN C. SEHAM, ESQ.

Stipulation for Dismissal Proposed by Company's Counsel

This stipulation, entered into by and between counsel for the parties this day of December, 1964.

WITNESSETH:

WHEREAS, the parties have entered into a Tripartite Agreement dated as of December 11, 1964, with the assistance of the National Mediation Board, and

WHEREAS, the Tripartite Agreement constitutes a permanent settlement of the Crew Complement Dispute on American Airlines, Inc., and

WHEREAS, it is anticipated that this settlement will inaugurate a new and harmonious era in the relationships of the parties, and

WHEREAS, the continuation of adversary proceedings is both unneeded and undesirable in these circumstances,

NOW, THEREFORE, it is stipulated and agreed that:

1. Pending litigation will be disposed of as set forth below;

(a) In the Flight Engineer Bargaining Case, all outstanding orders will be vacated and all appeals and pending requests for relief will be dismissed, with prejudice and without costs to any party. (The Flight Engineer Bargaining Case is *Ruby* v. *American Airlines, Inc.*, 63 Civ. 585, 227 F. Supp. 674 (S. D. N. Y. 1963), 329 F. 2d 11 (2 Cir. 1964),

certiorari granted, — U. S. —, 33 U. S. L. W. 3179, Nos. 454, 455 (1964).)

(b) In the Dues Check-Off Case, all outstanding orders will be vacated and the case dismissed with prejudice and without costs to any party. (The Dues Check-Off Case is *Manning* v. *American Airlines, Inc.*, 63 Civ. 1187, 221 F. Supp. 301 (S. D. N. Y. 1963), 329 F. 2d 32 (2 Cir. 1964), certiorari denied, — U. S. —, 85 S. Ct. 33, No. 79 (1964).)

2. The foregoing cases did not result in final judgment, and have been superseded by collective bargaining. Accordingly, no aspect thereof, or any determinations therein, shall be regarded as evidence that the parties, or any of them, have violated any requirements of law.

3. The Petition for Leave to Intervene in Case No. C-3351, before the National Mediation Board, will be withdrawn by American Airlines, Inc.

IN WITNESS WHEREOF, counsel for all parties have set forth their signatures below as of the date first above written.

.....

Counsel for American Airlines, Inc.

.....

Counsel for AAL Chapter, Flight Engineers International Association

.....

Counsel for Allied Pilots Association

Revision Suggested by Engineers' Counsel of Paragraph 2 of Company Counsel's Proposed Stipulation

2. The parties have resolved the issues between them through collective bargaining, and they, or any of them, will not initiate any independent action or proceeding in any Court or before any administrative body based upon any of the determinations in the foregoing cases.

Revision Suggested by Pilots' Counsel of Paragraph 2 of Company Counsel's Proposed Stipulation

2. The issues between the parties have been finally resolved through collective bargaining and the termination of the litigation hereinbefore described and they agree that none of them will initiate or participate in any action or proceeding before any Court, Agency, Board, or other forum whether governmentally or contractually established upon the basis of any of the determinations in the foregoing cases or upon the basis of the events and transactions from which such cases arose.

Alternative Stipulation for Dismissal Proposed by Engineers' Counsel*

IT IS HEREBY STIPULATED that the above-entitled action may be dismissed with prejudice, each party to bear his own costs.

Dated: New York, New York
March ; 1965

Attorney for American Airlines, Inc.

Attorney for AAL Chapter, Flight Engineers' International Association

Attorney for Allied Pilots Association

* See Moore's Manual. *Federal Practice Forms*. No. 19:3. p. 19-5 (1964).

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